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AN IMPLEMENTATION GUIDE FOR SETTLING
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ALTERNATIVE DISPUTES RESOLUTION METHODS

by

Karen K. Day

December 1989

Thesis Advisor:

E. Neil Hart

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**AN IMPLEMENTATION GUIDE FOR SETTLING CONTRACT DISPUTES WITHIN
DOD USING ALTERNATIVE DISPUTES RESOLUTION METHODS**

by

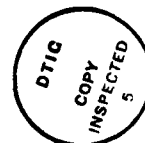
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ABSTRACT

This thesis discusses how to select alternative methods for resolving contract disputes other than the traditional disputes methods which are available under the Contract Disputes Act of 1978. The thesis first presents the different alternative disputes resolution techniques, (ADR). The various processes are broken into those methods which may be used within DoD and those methods which are currently not usable for a variety of reasons.

From there, the thesis introduces a list of case criteria which are relevant to choosing an appropriate ADR method. The criteria were compiled from a number of references in the ADR field. The criteria are then matched to appropriate ADR choices using a matrix. Only the usable ADR choices are analyzed for selection.

Finally, the reader is given a simple step by step guide using the matrix. The guide assists the reader in choosing whether to use an ADR method, and which method to choose if ADR is used. The final choice of method is based on analysis of the case criteria and matching the criteria with the right method or methods in the matrix tables provided.

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I. INTRODUCTION

A. BACKGROUND

Contract disputes are currently settled using the procedures in the Contract Disputes Act of 1978 (CDA). This law allows DoD contractors the option of using either the Armed Services Board of Contract Appeals (ASBCA) or the U.S. Claims Court to settle the disputes. The methods for resolving contract disputes are incorporated into the Federal Acquisition Regulation (FAR).

Contractors and contracting officers may have difficulty with the CDA's procedures. First, the process is time-consuming. Worse, the legal formalities often pit contractors and the Government against each other in win-lose contests, creating situations which can harm long term relationships. Finally, the cost of settling claims may be much higher than the value of the claim.

Industry faces many of the same problems. Within the private sector, companies have used other dispute resolution methods as alternatives to expensive, adversarial and lengthy court battles. Companies are often willing to waive some legal safeguards and risk a measure of uncertainty to gain expedient, more cordial solutions.

These alternatives are known collectively as alternative disputes resolution methods or ADR. ADR's basic options include adjudication, arbitration, mediation, fact-finding, and negotiations. Numerous variations and hybrids of these basic five procedures have been developed by industry and more recently the Government. This has given the field of disputes resolution a much larger portfolio of options to use in settling disputes.

The number of cases being taken to the Boards of Contract Appeals and the United States Claims Court has been growing steadily. This has prompted some Federal agencies to look at the ADR field for solutions to overcrowding and long delays in the traditional system. However, there is not much guidance to the contracting officers on the various methods available and how to choose an appropriate ADR method for a given type of dispute. This thesis will analyze ADR methods applicable to DoD in resolving contractor/Government disputes.

B. OBJECTIVES

This thesis has three main objectives. They are as follows:

1. Provide information on the specific ADR methods which have been developed both in industry and the Government. This will include descriptions of the method, and its advantages and disadvantages.
2. Develop a set of dispute criteria which may be used to choose an appropriate ADR method.

3. Develop a guide for the contracting officer which will help him/her choose a method of dispute resolution for a given contract dispute. This guide will match the criteria with the different ADR methods and recommend the most appropriate method(s) to use.

C. RESEARCH QUESTION

1. Primary Research Question

What are the best ADR methods for resolving different kinds of contract disputes?

2. Subsidiary Research Questions

- a. What are the recognized ADR methods and their characteristics?
- b. What are the key criteria of disputes that must be considered in choosing an appropriate ADR method?
- c. What is the best ADR method(s) to use given specific dispute criteria.

D. SCOPE

The scope of this thesis is to provide a guidebook for contracting officials on the most appropriate ADR method or methods to use given specific criteria.

The areas focused upon included:

1. A general description of ADR including its advantages and disadvantages to orient the reader to the general field.
2. A description of the traditional contract dispute methods as described in the CDA and the FAR.
3. Background on pertinent legal statutes and interpretations that restrict or control the use of certain ADR methods within the Department of Defense.

4. Identification of the specific ADR methods which have been developed. These methods are defined. The process is explained using examples and a brief development history as appropriate. Processes suitable for DoD contract disputes are presented separately from those which are not suitable.
5. Development of criteria which will provide a structure for choosing between alternative methods.
6. Analysis of the ADR methods which are appropriate for settling contract disputes within DoD using criteria.
7. Development and presentation of a guide which recommends the appropriate ADR method or methods to use if a case has a given set of criteria. In some cases, more than one method is appropriate.

The areas which were excluded include the following:

1. There was no analysis of ADR methods which were inappropriate for DoD contract disputes. The thesis did provide some background on the excluded methods and the reasons for the exclusion.
2. There was no attempt to describe more than the general ADR processes and their hybrids. Each agency and corporation which uses these techniques has a slightly different variation on the basic procedure, since one of ADR's attributes is its flexibility. Describing all variations was not feasible or relevant.
3. There was no attempt to guide the contracting official in choosing which criteria pertained to his/her specific case. In some cases, there must be legal or other expert advice to decide if a particular characteristic is pertinent. For example, witness credibility may be important in some cases. This is a judgement call on the part of the agency, not a choice defined in this thesis.
4. There was no attempt to generate empirical data. Only existing information was used.

E. LIMITATIONS

The study is limited by one main factor. There is almost no empirical data available which matches up the specific criteria of a dispute with the different ADR methods. The empirical data which are available are usually restricted to one or two well known methods, and are very limited in scope, or deal predominantly with criteria which will guarantee a certain outcome, instead of an appropriate choice of method.

Therefore, the guide was developed using primarily non-empirical data. This means the recommendations and conclusions are a compilation of the general consensus in the field concerning how to choose a method. Data accuracy is dependent on expert consensus, not on quantifiable figures.

F. ASSUMPTIONS

This thesis was written under the following assumptions:

1. The reader has a need for a practical guide to ADR and how to choose ADR methods. This assumes that his agency chain of command is not actively opposed to the use of ADR.
2. The user has additional legal expertise available.

G. LITERATURE REVIEW AND THEORETICAL FRAMEWORK

Approximately 115 books, articles, reports and hearings were reviewed during this research. Of these, 65 were actually referenced. Only 10 references contained empirical

data. The references containing empirical data are listed separately in Appendix A.

The literature search concentrated on information available from the private and public agencies that specialize in ADR research, use and consulting. Almost all of the data were provided by practitioners and researchers in the field and included:

1. General books on the different ADR methods.
2. Current magazine articles, predominantly contained in legal publications. Here, legal and general data bases were invaluable.
3. Research papers and various studies done mostly by or for Government agencies, such as the Department of Justice and the US Army Corps of Engineers. A great number of documents were obtained from an ADR sourcebook put out by the Administrative Conference of the United States.
4. Training material put together by the Corps of Engineers, the Air Force and several private institutions such as Harvard University.
5. Hearings on ADR held by the Committee on the Judiciary in the House of Representatives.
6. Transcripts of interviews with several key agency representatives on their agency use of ADR.

H. METHODOLOGY

The methodology used in developing this thesis was as follows:

1. The research question was chosen.
2. An initial literature review using commercial data bases and library materials was conducted. The results were disappointing.

3. A number of specialized sources were contacted. These sources included Federal agencies who had used or researched ADR, legal counsels, Senate and House of Representative staffers, ADR information clearinghouses and private ADR consultants. These agencies collectively provided about 100 separate references.
4. An intense literature review was conducted, in coordination with on-site research at several information clearinghouses in the Washington DC area. Three key Government agencies were contacted and personnel interviewed to help clarify certain issues in the literature.
5. Information was compiled on all available ADR methods. The ones which were not suitable for DoD contracting disputes and the scope of this thesis were discussed, but not analyzed. This included most binding ADR procedures which are illegal in DoD, several procedures which clearly do not apply to Government contracting and all pre-dispute procedures.
6. A list of criteria was compiled for each appropriate ADR method. This was done by screening the literature for clear recommendations based on technical expertise in the field, and in a limited number of references, empirical studies which matched criteria with specific procedures.
7. Criteria were matched with the appropriate ADR method or methods. This was accomplished by reviewing the literature for recommended matches and models. Most of the data were non-empirical. The small amount of empirical data which were available were often highly concentrated and very narrow in focus, or did not cover a large sample. For that reason, it was not weighted more heavily in the compilation of data, particularly since the available empirical data did not contradict non-empirical data.
8. A data matrix was developed which matched the ADR method to the criteria, based on the amount of consensus in the literature. Criteria had either a positive or negative match to the different methods, depending on whether they favored selection or deletion of a method. The matrix

showed the number of times positive and negative matches occurred in the literature.

9. These data were further analyzed. The matrix was simplified and divided into several tables which were designed to help the contracting officer choose an appropriate ADR method.
10. ADR methods were analyzed and grouped based on criteria developed in the tables. This was done to help the contracting officer mentally categorize the procedures, and show certain trends in the different methods.
11. Final conclusions were presented. The three research questions were answered. A guide for the contracting officer was presented, with information on how to use the tables to select an ADR method. The guide sets forth a number of steps to assist the contracting officer in the different decisions involved in ADR selection.

II. BACKGROUND

This chapter will discuss the background of alternative disputes resolution methods or ADR. First, ADR will be defined. Next, a short history of ADR in the Government will be presented, followed by information on the traditional contract disputes methods under the Contract Disputes Act of 1978. Finally, legal background will be presented to orient the reader to the legal issues surrounding the use of ADR.

A. BACKGROUND ON ADR

Alternative disputes resolution is broadly defined as any alternative to the traditional court system. Within the Government, since agencies are subject to the Contract Disputes Act of 1978, this definition can be expanded to encompass alternatives to the formal Board of Contract Appeals proceedings as well as the courts.

The use of alternatives to the court system has been around for a long time. Most of the procedures incorporate mediation, negotiation or arbitration in different formats.

All three have been used in various guises for centuries. For example, mediation was commonly used in colonial New England [11:3]

Recently, there has been a reawakening of interest in alternatives to litigation. The 1960's were characterized by a growth of litigation. Times were troubled, new legislation involving areas like civil rights created more opportunities for court actions, and traditional mediating institutions such as the churches and families were breaking down. [11:4]. A concentrated search for alternatives began. A number of institutions, such as the National Center for Dispute Settlement and the Center for Public Resources, were created to study the demand for alternatives. [11:4-5] New processes such as the mini-trial were developed by industry, while older methods such as arbitration were reexamined for newer uses.

Although certain types of ADR such as arbitration had been used in the private sector for many years, ADR spread more slowly within the Federal Government. In the past decade, since the passage of the Contract Disputes Act of 1978, the increasing burden on the Boards of Contract Appeals, as well as the courts, has motivated some agencies to search for ways to offload the formal process. Leaders in the field include the Environmental Protection Agency, the US Army Corps of Engineers, and more recently the Department of the Navy.

The search has been for new and creative ways to resolve conflicts. Some methods involve resolution before the problem escalates by involving interested parties in the rulemaking process, or regularly discussing potential problem areas.

Other methods involve the use of third party neutrals who help to mediate, arbitrate or negotiate solutions. This fascinating field is characterized by innovation, and the growth of hybrid techniques tailored for the agency's special needs.

B. ADVANTAGES OF ADR

The interest in ADR within DoD, is caused by a number of factors which are listed below. They include the following:

1. ADR is a voluntary process within DoD. When parties choose to use ADR, it is because they want to do so, not because they are forced into a set process. This often creates a better atmosphere for settling differences, because the parties can choose the forum and often the time and place.
2. The processes are flexible. There are currently a large number of ADR processes which give managers a choice of forum, tailored to suit the individual case needs. Most of the methods are internally flexible to a degree. In other words, within a general framework, the details of the process are left to the disputing parties. Some of the common details which may be left to the parties include time limits, place, if witnesses will be allowed, length of discovery, and who will participate.
3. The procedures used are faster than the formal court or board processes. How much faster is dependent on the dispute's history and the willingness of the parties to settle. The length of time almost always leads to lower court costs, lower interest costs and lessens expensive disruption of operations.
4. ADR is an important alternative when the contractual arrangement does not end with the dispute. The adversarial atmosphere of a court room is not conducive to good long-term relationships which characterize many defense contractor-Government relationships.

5. ADR methods allow managers to retain control over the process. In most of the methods, decision making authority is retained by the parties. Since the parties can explore the underlying problems as well as the actual initial dispute, and determine the solution, ADR decisions tend to hold up over time.[45:41]

C. DISADVANTAGES OF ADR

ADR had disadvantages as well. Certain situations do not lend themselves well to any ADR process. As in any system, there are certainly potential pitfalls. These disadvantages include the following:

1. The use of ADR is considered inappropriate by many experts in areas that involve only a question of law or in cases which would set precedent for a number of other cases.[18:2] It should be clearly understood that ADR is not a substitute for the courts, since in certain cases, it would not be appropriate to have informal settlement. Rather, it is a method to offload the existing court system, allowing cases which require litigation to have their day in less congested courts.
2. ADR is primarily a voluntary procedure. DoD contracting officials need contractor approval and internal agency approval to pursue alternatives. Since ADR is still a relatively unknown field, one or both parties may be reluctant to break away from the conventional dispute resolution path. This could be a major problem for contracting officials attempts to use ADR. The tendency in the Government and dealing with the Government is to use established procedures, which could make the initial use of ADR difficult in agencies not yet piloting ADR programs.
3. Another potential disadvantage is that ADR will simply add another layer to an already cumbersome process.[42:12] Critics can point to the current disputes process, which allows the contractor to choose between four forums. Few choose the accelerated and expedited procedures, and the boards are almost as judicial as the court,

because of the limited potential for appeal. The fear is that other ADR methods may become too institutionalized, and create even more of a burden on the system as they become more formal. Linked to this problem is the fear that ADR may allow some dishonest contractors to stretch out the process because they do not want expedient settlement.

4. Parties are reluctant in some cases to embark on a process which may end in the courts anyway. Agency rules often stifle a 'final decision' by subjecting it to numerous review layers.[37:2] The contracting officials that use ADR to settle disputes must work within the framework of the agency to ensure that the final decision is made by someone empowered to obligate the agency.
5. Agencies are bound by restrictions that do not encumber private industry. Government processes are controlled by statutes like the Freedom of Information Act, the Competition in Contracting Act and the Administrative Procedures Act, as well as annual funding restrictions and internal regulations.[37:2] Some ADR types are actually prohibited by interpretation of one or more statutes. {26:3} All ADR reviews for potential use must include allowances for a large number of statutes.
6. Some Government officials feel that ADR may reduce the accountability of Government officials.[42:9] This could be done by allowing some of the decision making authority, even indirectly, to be handed over to third party neutrals. This is of particular concern with ADR that uses binding decisions from a third party neutral, although this is currently not allowed within DoD.

D. BACKGROUND ON CONTRACT DISPUTES

The Government has attempted to solve disputes administratively as well as judicially for many years. Beginning in 1868, the courts allowed the Secretary of War to settle a claim with a board. [12:M-1-1] Boards were

occasionally used to settle claims, from then on, for about 70 years. During World War II, to expedite the war effort, boards became widely used. [50:602]

In 1877, Congress passed the Tucker Act, which waived sovereign immunity on express or implied-in-fact contracts. [15:17-2] Basically, this allowed contractors to bring suit against the Government for anything expressly stated in a contract, or implied by extrinsic evidence. [6:21]

The initial rights of contractors to use the courts were limited under the Tucker Act. Contractors were required to exhaust all administrative remedies before they could use the courts. Then, they could use the courts only in cases of fact where fraud was involved. [6:2]

For years, the courts upheld this view. In 1951, the Supreme Court overruled a Court of Claims decision which granted relief to a contractor on the basis that the agency's decision was arbitrary and capricious. The landmark case was the US v. Wunderlich. It firmly established that judicial relief would be granted only for fraud. The Supreme Court wrote "...If the standard of fraud we adhere to is too limited, that is a matter for the Congress...". Congress obligingly countered by passing the Anti-Wunderlich Act in 1954.

The Act allowed the courts to grant relief to contractors for four reasons in addition to fraud, for matters-in-fact.

Contractors could now appeal decisions which were arbitrary, capricious, not supported by substantial evidence or so grossly erroneous as to imply bad faith. The Act also permitted review for matters-in-law.[55:150]

Following the passage of the Anti-Wunderlich Act, the Government adopted a disputes clause for its contracts. The clause basically stated that:

1. Disputes on factual matters shall require a contracting officer's final decision (COFD) which will be rendered in a reasonable amount of time.
2. The contractor must appeal in writing within 30 days.
3. Appeals are heard based on Anti-Wunderlich Act standards.
4. Pending a final decision, the contractor must continue to work.[55:149]

This clause created some problems. These are worth exploring, since the Contract Disputes Act of 1978 (CDA), was passed to correct these faults.

1. The contractor had to exhaust all administrative remedies before he was allowed to go to the courts. [19:1-2]
2. The contractor was not allowed to introduce de novo (new) evidence to the court. In a decisive case in 1963, the Supreme Court held that new evidence could not be introduced in an appeal. Based on the ruling, courts could only review existing records. This put great pressure on the boards to protect Government and contractor rights. As a result, boards became more formal. [6:2]
3. Jurisdiction was limited to matters arising under the contract. The contractor could only seek relief from a COFD when the contract provided a specific remedy-granting clause. The courts

often dismissed claims involving other areas such as Government breach of contract, because of a lack of jurisdiction. [5:603]

4. Board actions were very slow. The old disputes procedures contained no provisions for expeditious settlement of small claims.
5. COFDs could take quite a while because of the range of interpretations concerning the 'reasonable time' allotted to the contracting officer. [6:198]
6. There was no Government right of appeal to a board decision. Early on, the courts decided that the Government could not appeal a ruling against itself. [12:M-1-8]

Many legislators felt a change was needed. In the closing days of the 95th Congress, a bill was introduced and became law. It was the Contract Disputes Act of 1978. Unfortunately, legislators introduced numerous changes at the last minute with little or no debate. Consequently, Congress incorporated these changes piecemeal into the CDA, without all of the recorded discussion that usually documents Congressional intent. The lack of documentation has caused some interpretation problems. [17:2]

E. CURRENT CONTRACT DISPUTES PROCEDURES

Disputes on all contracts entered into after 1 March, 1979 are resolved within the guidelines of the Contract Disputes Act of 1978 (CDA).

Disagreements over claims arise in many contracts. Often, the contracting officer and the contractor can informally

resolve the disagreement. In fact, the intent of Congress, documented in the legislative history of the current disputes procedures, is that contracting officers will settle informally whenever possible. When they cannot, the disagreement becomes a dispute.[4:981]

To begin the formal dispute process, the contractor will submit a written claim for a contracting officer's final decision (COFD). The contracting officer reviews the dispute and renders a COFD in writing. The COFD is issued within 60 days if the claim is under \$50,000. In cases over \$50,000, the contracting officer will issue a decision within 60 days, or tell the contractor when the decision will be issued. [17:4]

The contractor must certify that all claims over \$50,000 are in good faith, and that the claim and supporting documents are accurate, complete, and reflect only what the Government owes the contractor. [55:151]

The courts have determined that claims including quantum (money) must specify the amount of money requested in order to qualify for a COFD. This stems from the certification requirement. Unless the contracting officer has a value, he cannot determine whether the claim must be certified. The exceptions to the rule are claims requesting non-monetary relief, such as a request for excusable delay. [4:978]

The contractor cannot appeal until he/she receives a contracting officer's final decision. There is one exception. When a contracting officer fails to provide a COFD in a reasonable time period, it is construed as a denial of the claim. At that point, the contractor may begin the appeal.

DoD contractors may choose between administrative and judicial remedies on appeal. They can go before the Armed Services Board of Contract Appeals (ASBCA) if they file within 90 days. Contractors can appeal board decisions on matters of law, but decisions are final on matters-in-fact, except when the decision is arbitrary, capricious, fraudulent, grossly erroneous or not supported by substantial evidence. Board appeals may be submitted to the US Court of Appeals for the Federal Circuit and in rare instances to the Supreme Court. [4:1012]

Alternately, contractors may file a direct appeal with the US Claims Court within one year. [51:2] The contractor may appeal Court decisions to the US Court of Appeals for the Federal Circuit in accordance with the Federal Courts Improvement Act of 1982, with additional appeal allowed to the Supreme Court if they elect to take the case. Decisions on matters in fact will only be set aside if found to be 'clearly erroneous'. [4:1014]

At any time during the disputes procedure, the contracting officer may attempt to negotiate a settlement. If

negotiations are reopened, a COFD is in jeopardy of losing finality. [4:984]

The CDA extended the jurisdiction for the ASBCA and other Boards of Contract Appeals (BCA) to all claims related to the contract, as well as those arising from the contract. Claims do not need to be covered by a specific clause to be valid. Consequently, the disputes process now covers breach of contract, reformation and rescission issues, as well as the more traditional areas like equitable adjustments and constructive changes. [55:151].

The CDA calls for two additional procedures, designed to speed up resolution of small claims. For expedited claims under \$10,000, the contractor may request a decision by a single member of the BCA within 120 days if possible. An alternative for claims under \$50,000 is the accelerated process. Accelerated cases must be resolved, whenever possible, within 180 days. There is no judicial review of a small claim decision, except in cases of fraud. Note that the Wunderlich safeguards on arbitrary or capricious decisions, etc. do not exist under the small claims process. [51:3]

Other changes implemented under the CDA include:

1. The Government has the right to seek review of a decision.
2. Simple interest, at the Treasury rate, accrues on a contractor claim, from the day of Government receipt, not the day the COFD is rendered. [55:151]

3. The Court can consolidate all claims involving the same contract, as part of its 'housekeeping' authority. [17:8]
4. The contractor may be paid if the court renders a partial judgement on the case, pending final resolution. [17:8]

The disputes process does not cover all cases. First, the Act specifically excludes real property, certain TVA contracts, non-appropriated fund contracts, contracts with foreign agencies and maritime contracts which do not carry a disputes clause. [6:22]

Next, under the umbrella of the Tucker Act, only implied in-fact not implied in-law contracts are covered by the disputes process. The guidance for the difference is as follows:

The fundamental difference between a contract 'implied in fact' and one 'implied in law' is not necessarily whether there has, or has not, been a written instrument executed between the parties. The true criterion is that a contract 'implied in fact' rests upon consent implied from facts and circumstances showing a mutual intention to contract, whereas in one 'implied in law' consent is lacking, being forced upon the parties by law, sometimes even in the teeth of their express contract. [6:21]
Therefore, certain disagreements are excluded from the disputes process because they are by nature implied in law. [6:21]

Another basic area excluded from the disputes process is fraudulent claims, although the courts have taken cases involving partial fraud by severing the fraudulent portion from the other parts of the claim. In some cases, the boards will continue to process the claim when there is doubt about

the Government allegation of fraud. These cases are rare. The usual procedure is to suspend proceedings in cases of alleged fraud. [4:956]

FAR 33.210 and the CDA also forbid the contracting officer from settling disputes under other agency regulation or statutes. The FAR states:

...This authorization does not extend to a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle or determine...
[61:33.210]

For instance, Davis-Bacon wage disputes are settled by the Department of Labor, outside of the contracting officer's jurisdiction. [4:983]

Finally, the disputes process will not process claims which are primarily in tort. [4:954] Basically, a tort is an act which violates a basic freedom of an individual such as freedom from injury to himself, his property, or his reputation. Torts protect basic freedoms; contract law protects the interests of deliberately agreed on promises. The courts will hear the case only if a contract agreement is involved, as well as a basic freedom. [42:150-151]

F. ADVANTAGES OF THE CURRENT PROCESS

The current disputes process, first and foremost, allows everyone access to due-process of law, with the sole exception of the accelerated and expedited procedures. Contractors can

elect direct access into the court system, which protects their rights on an equal footing with the Government. The Government can appeal board decisions to the courts, which it could not do under the old disputes process. The system is much more equitable. [17:7]

The process also provides an excellent forum for settling a question of law. Many cases involve the same basic legal question. Once the courts rule on the case, the ruling sets a precedent for other similar cases. Although the courts take time, it is important in our society to know how the laws are to be interpreted in light of the current trend of thought in our society. [53:10]

The procedure does allow for accelerated and expedited procedures, recommended for small claims (under \$50,000) not involving novel questions of law. [17:7] This gives the contractor the ability to get a dispute resolved quickly, if he chooses to give up some legal safeguards.

Finally, the courts procedure is necessary for cases involving many contractors on social issues. Government acquisition exists to purchase services. It is also used to further the social and economic goals of the Government. For example, the role of small business is one of the most commonly cited social issues, and is applicable to this point. A major issue concerning small business should be settled by the courts, so doctrine can be recorded for future cases.

G. PROBLEMS WITH THE CURRENT PROCESS

Congress made some improvements in the disputes process with the passage of the CDA. However, the procedure is still riddled with problems. The following is a discussion of the major problems concerning contract disputes.

The decision which kicks off the disputes process comes from the contracting officer. In many cases, the contracting officer is the same individual who made the decision the contractor is disputing. If a contracting officer finds for the contractor, he may be rejecting his own previous decision that was made in the process of safeguarding the public trust.

The contracting officer is also expected to make rational, often complex and creative decisions to avoid litigation. Unfortunately, many contracting officers prefer to use the disputes process, because it is safer. Otherwise, they may have to defend their methods and decisions to auditors and investigators in the Federal Government. [42:1]

Contract disputes may frequently involve highly technical matters. These cases could get a poor hearing under the current process. The ASBCA panel members or judges are, by nature, generalists. They are skilled in the law but may have to rely too heavily on expert testimony for industry practices and technical details.[53:10]

Since the decision of the boards is usually binding on matters of fact, the boards have become as formal as the courts. Hearings are extremely complex in an attempt to safeguard the rights of the litigants. Few contractors use the expedited processes anymore, and fewer still represent themselves before a board. Most contractors use lawyers whose role is to get the most advantageous settlement possible for their clients in win-lose battles. Simple issues can turn into complicated battles. [42:6]

These lengthy battles hurt both the Government and the contractor. First, the expense uses up resources better applied elsewhere. Secondly, the delay caused by the process may harm or destroy the contractor, the ability of the Government to acquire the good or service, and may even disrupt critical national missions. [53:Table 1]

H. LEGAL BACKGROUND

The following section will provide information on selected laws which impact on the use of ADR in the government. This section is intended to give the contracting official some familiarity with the legal issues to allow him/her a better understanding of potential challenges and difficulties associated with the process.

There is general consensus in the literature that the recognized ADR methods used today are legal, with the possible

exception of binding arbitration and its hybrids. However, many of the innovators in government agencies are concerned that they are 'on the edge' using techniques that are not expressly allowed by statute. This concern was expressed by Mr Marshall Breger, Chairman of the Administrative Conference of the United States, in his testimony to the House Committee on the Judiciary in 1988. He stated that some of the agencies he dealt with are concerned that the Comptroller General or the Congress could question their specific authority to use ADR at any time.[60:69]

Mr. Breger was referring to agency officials who have pioneered the use of ADR in pilot programs within the Government. If these officials are concerned, it is understandable that a contracting officer, unfamiliar with ADR, would be hesitant to consider its use.

The most serious legal questions raised on the use of ADR concern the use of arbitration. Binding arbitration is currently not authorized within DoD. The Comptroller General as head of the GAO, is responsible for oversight on the expenditure of public funds. In the last 60 years, the Comptroller General has issued a number of decisions prohibiting expenditure of funds for arbitration except where specifically allowed by statute. Although the GAO has not been consistent in it's interpretation of statutes, there is sufficient uncertainty on the legality of using binding

arbitration to prevent any agency, or contracting officer from taking a chance. Few would consider chancing a GAO finding that the agency officers were responsible for illegal, improper or incorrect payment of Government funds.

GAO opinions are based on several statutes and court cases. The first is 31 U.S.C., Section 1346, which states,

Except as provided in this section- (1) public money and appropriations are not available to pay- (A) The pay or expenses of a commission, council, board, or similar group, or a member of that group; ... this section does not apply to (1) commissions, councils, boards, or similar groups authorized by law....

Under this law, the Comptroller General has disapproved arbitration, in some cases, and allowed it in others. [41:10]

Other objections from the Comptroller General have included the exclusive right to determine claims belongs to the Comptroller General under the Budget and Accounting Act of 1921, and to the courts under the Tucker Act, the ruling that the United States Arbitration Act does not cover disputes involving the US, that an officer who lacks authority to settle a claim cannot authorize arbitration, and finally that statutes allowing arbitration imply that absent general statutory authority, arbitration cannot be used to bind the Government. [41:13] The GAO added to the uncertainty in ruling in several cases which allowed arbitration for fact-finding only, predominantly limiting arbitration to the amount of the claim. [41:11]

In these opinions the GAO has wrestled with the question of authority to arbitrate. Is it desirable or even constitutional to allow a third party to decide policy and the expenditure of public funds? In Congressional testimony, Professor Harold Bruff spoke of the constitutionality of binding arbitration. He relied extensively on the Supreme Court decision in Buckley v. Valeo (1976) for his first point, which basically suggested that policy making belongs in the hand of Government officials. His second point was that mandatory binding arbitration could be severely tested in the courts for preventing access to due process of law. His third point was that arbitration may be disallowed by the courts if it deals with setting public law norms that are still being settled. [60:100-102]

The legal analysis reviewed in the literature suggests that binding arbitration entered into voluntarily, subject to agency oversight and judicial review, is constitutionally acceptable within the Government, provided the arbitrator does not deal with public policy making or setting precedent.

Another important legal question concerning arbitration lies within the Contract Disputes Act of 1978. The legislative history of the CDA clearly allows the contracting officer to explore resolution of contract disputes by negotiation prior to litigation, and intends to provide a variety of forums for the contractor. [64] The mandate is so clear that a section

was added to the Federal Acquisition Regulation which states in 33.204 that:

It is the Government's policy to try to resolve all contractual issues by mutual agreement at the contracting officer's level, without litigation. In appropriate circumstances, the contracting officer, before issuing a decision on a claim, should consider the use of informal discussions between the parties by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences.[61]

Non-binding ADR is conducted under the umbrella of this clause within DoD. However, it is not interpreted to include arbitration or its binding hybrids such as binding dispute panels. Sections 10(a) and 10(b) of the Contract Disputes Act, state that the contractor may go directly to the courts initially and that matters in law, decided in front of a board, may not be final or conclusive "notwithstanding any contract provision, regulation, or rules of law to the contrary". This indicates that the Congressional intent was to bind the parties only within the framework of the CDA, and not allow a binding agreement outside the statute. [41:21]

In the final analysis, the use of binding arbitration within DoD in settling contract disputes is so unclear, that unless the Congress provides clear statutory authority in the future, it is not an available alternative.

Another legal area to be considered is the legality of the ADR procedures themselves. The rulemaking and decisional forums for the Government are laid out in a general statute

called the Administrative Procedures Act. The administrative hearing is covered in the order or decisional section of the law, under adjudication. Basically the APA states that "...in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing..." there are certain requirements. The hearing requirements were tested in Goldberg v. Kelly (1970). In this case the Supreme Court decided that the hearing must be very structured, and rather similar to a court to pass a constitutional test. Although the case has since been diluted by decisions that the formality of the hearing must be balanced by the burden on the system, it leaves a question on what kind of hearings are permissible, including the many different ADR processes. [28:1410]

One of the benefits of private sector ADR is the confidentiality issue. Corporations appreciate conducting their dispute resolution away from the glare of a public courtroom. However the Freedom of Information Act (FOIA) and the general public consensus to conduct 'Government in the sunshine' disallow the complete confidentiality of ADR proceedings. This makes the process less attractive to private corporations and to contracting officials who are nervous about honestly negotiating their differences for fear the numerous investigative agencies may criticize their decisions.

The FOIA requires that the public has access to all final agency opinions on adjudicated cases including dissenting opinions.[62] In addition, agency records must be made available to the public with nine exceptions. The trade secrets exception covering confidential commercial and financial information, and the exception on inter-agency memorandums may preclude release of some ADR material.[62] However, under the FOIA, public decisions and the basis for the decisions are usually open to the public, which dilutes the advantage of confidentiality enjoyed by private sector use of ADR.

The final statute which must be considered is the Competition in Contracting Act of 1984 (CICA). CICA impacts on the hiring of third party neutrals, when required. If the retainer is under \$25,000, FAR 13.106 requires quotations, usually oral, from a reasonable number of sources to ensure competition. Contracts over \$25,000 require full and open competition, unless one of the seven exceptions in U.S.C. 41, Section 253 apply.

This requirement for competition must be recognized and handled, especially when the process calls for the joint appointment of a neutral or neutrals by the contractor and the Government. One way to deal with the situation is to establish rosters of acceptable neutrals. Another would be to request waivers for full and open competition. However it is done,

the competition requirement must be recognized and planned for in any process that involves a third party.

Currently, the Senate is considering a bill that would amend certain statutes to make it easier for Government agencies to use ADR, including arbitration. The bill provides for the following:

1. Encourages and authorizes agency use of proven alternatives to litigation, including arbitration, and further encourages agencies to develop additional techniques. The authorization requires the agency to consider the case in view of precedent or policy considerations, need for a full public record, and impact on parties who are not litigating before the decision is made to use an alternative method.
2. Requires that each agency appoint a dispute resolution specialist and provide ADR training to appropriate personnel.
3. Requires standard contract, grant and other agreements be rewritten to encourage the use of ADR. This section includes amendments to the FAR.
4. Amends Section 556(c) title 5, from the Administrative Procedures Act to include ADR. This amendment would lift any questions on the permissible format for a hearing.
5. Specifically allows the use of private neutrals.
6. Grants that neutrals and documents used during an ADR process will be confidential for other proceedings, with a few exceptions such as criminal investigations or with the consent of both parties.
7. Authorizes arbitration by statute.
8. Requires an annual report to the Congress, to be compiled by the Administrative Conference of the US.

9. Authorizes the Administrative Conference of the United States to compile and maintain a roster of neutrals.
10. Amends the CDA to clarify Congressional intent to allow ADR to be used within its framework.

I. SUMMARY OF CHAPTER

Alternate dispute resolution techniques are being explored in the public sector because they offer a variety of benefits, including lower costs, more control by managers, faster procedures and more flexibility. However, they are inappropriate in some cases, such as those requiring precedent, and are difficult to use initially because of the lack of experience in using many of the processes correctly, within the framework of numerous regulations and statutes.

Currently, DoD officials use the procedures specified in the Contract Disputes Act of 1978 almost exclusively. The CDA corrected many of the problems inherent in the disputes process. However, the CDA is predominantly a judicial process with many of the disadvantages inherent in such a process, such as adversarial proceedings and long waiting times.

ADR provides some answers to the problems in the CDA processes. No one procedure provides solutions to all problems, but different ADR methods allow the manager and legal officials to key on and correct selected deficiencies.

ADR selections are restricted by certain statutes, and interpretations of the statutes. Binding decisions by a third

party neutral outside the Government are forbidden under existing statutes. Other non-binding methods are restricted in matters of privacy, and the hiring of third party neutrals. Finally, there are unresolved issues concerning the format of acceptable hearings as required by statute under the Administrative Procedures Act. However, it should be noted that most forms of non-binding ADR have been unchallenged. They may even be encouraged under broad interpretations of the directive in the FAR for the contracting officer to use informal settlement whenever possible.

III. DATA PRESENTATION

A. GENERAL

Chapter III will present data on the different ADR methods contained in current literature. The chapter begins with a continuum which divides the different methods of ADR into categories. Next, the ADR processes which can be used in the specialized field of contract disputes are discussed, followed by discussions of methods which cannot be used currently in DoD for various reasons.

B. ADR METHODS

ADR methods are spread across a broad continuum of specific categories. At one end are informal procedures and cooperative decision making between disputants, including identifying procedures to settle potential disputes. From there, methods become increasingly formal, with the other end of the spectrum being binding assistance by a third neutral party. This continuum is very helpful in categorizing the ADR methods which are currently available.[45:24] The continuum chart shown below (Figure 1) is adapted from a chart developed by Dr. Jerome Delli Priscoli of the US Army Corps of Engineers and Christopher Moore of CDR Associates. The chart has been modified to match this thesis by removing relationship building assistance as a subheading, as well as adding and deleting certain processes.

COOPERATIVE DECISION MAKING	THIRD PARTY ASSISTANCE	THIRD PARTY DECISION MAKING		
	PROCEDURAL	SUBSTANTIVE	ADVISORY	BINDING
Information Exchange	Facilitation	Mini-Trial	Non-Binding Arbitration	Binding Arbitration
Negotiations	Mediation	Dispute Boards	Summary Trial	Medarb
Regulatory Negotiation		Advisory Mediation		Mediation Then Arbitration
		Factfinding		Private Judging
		Settlement Conference		Small Claims
		Ombudsman		
		Neighborhood Justice Center		

Figure 1. ADR Continuum

The first area is cooperative decision making, where the parties relate directly without assistance. This is the most commonly used category of ADR, since it encompasses negotiation. Cooperative decision making is important, because it allows the parties to handle disputes before they get on an adversarial track. The processes involved in cooperative decision making include areas like cooperative problem solving and negotiations.[45:27]

The remaining areas involve solutions based on third party assistance. First, a third party may be used to provide procedural assistance. Procedural assistance is helpful when the parties have not identified a satisfactory forum for discussions or cannot decide how to begin talking. A neutral can help establish an acceptable process, train the negotiators, help keep the process on track and keep the data exchange flowing. The processes used here include facilitation and mediation. [45:30]

A third party may also be used for substantive assistance when the parties do not agree on the facts, or differ on the legal interpretations of the contract. The use of a neutral here, to help interpret the data and/or provide an opinion, can often break the impasse. Procedures used include mini-trials, advisory panels, advisory mediation, neutral fact-finding and settlement conferences. [45:31-34]

Finally, a third party neutral(s) may be used for non-binding or binding assistance. The neutral makes the decision after hearing the facts of the case. In non-binding assistance, the parties can accept the decision completely, use it to further negotiations, or disregard it totally by choosing to continue the dispute in court. In binding assistance, the parties must abide by the decision, subject to very limited review. Within DoD, binding assistance is not legally recognized, with the exception of the small claims ASBCA procedure. Procedures for non-binding assistance include non-binding arbitration and summary procedures. Procedures for binding assistance include different types of binding arbitration, mediation combined with arbitration, and private judging. [45:34-36]

The following sections will describe the different ADR methods currently used in Government and industry, beginning with the cooperative methods as discussed above. The discussion will include a brief history of the method, if relevant, describe the process, and provide the advantages and disadvantages.

1. Negotiation

Negotiation can be defined as "...a problem solving process in which two or more people voluntarily discuss their differences and attempt to reach a joint decision on their common concerns." [45:43] Negotiation is the most commonly

used form of ADR. In fact, it is the heart and soul of many of the processes which involve interaction between the parties, with or without third party assistance.

The art of negotiating has been a part of human relations throughout history. However, negotiating theory has become more sophisticated in the past few decades as businesses and governments searched for better conflict resolution than provided in the courts. Research in the subject has revealed a number of new techniques which can improve negotiations and tailor discussions to specific situations more effectively.

Negotiations can be generally divided into two categories. First is the zero-sum approach adopted from game theory, which assumes that one side's gain will be another side's loss. The zero-sum approach allows only win-lose negotiations. In certain cases it may be the only type of negotiation the situation allows.

Integrative negotiating is the alternate approach. In public sector negotiations, what appear to be zero-sum situations may often be integrative, or potential win-win negotiations once they are reviewed. The integrative method teaches that parties value certain things more than others, which allows them to trade off items that are less important for those that are more important. Integrative bargaining keys in on positive problem solving and cooperation. It does

not rely on hardened positional bargaining. Instead, it allows the parties to explore ways to meet firm goals without locking them into a single solution. Just as there are numerous trails to the top of a mountain, the integrative approach believes there are numerous paths to reach an objective. [7:85-88]

No one set process exists for negotiations, but the general process outlined below is a commonly used model. The model is flexible and can be adjusted to suit the needs of an agency. It shows the stages most negotiations go through.

All good negotiations begin with effective planning. Before a claims negotiation begins, the negotiator should formulate his/her strategy and decide which items are important and which items are easily conceded. During this phase, the negotiator should decide the minimum and maximum ranges he is willing to concede. It is also important to know as much about the other party as possible. Obviously, if the negotiator understands his opponent's motives, alternatives, and organizational culture, the chances of reaching a mutually agreeable settlement are higher. Finally, the negotiator should understand all the issues as clearly and factually as possible. [13:126]

It is important to understand the differences between positions, interests, rights and power during the preparation for negotiations. Positions are what people say they want.

Interests are the things that the parties really care about. They are the underlying reasons for positions. [3:5] For example, contractor claims for \$35 almost certainly involve more than just the need for the money, when the contractor is willing to take it to court. In reality, the contractor may be interested in being heard out by a third party, or showing the unreasonableness of a government policy. The key to many successful negotiations is to determine what the interests are, and how they can be reconciled in a fair settlement. Otherwise, other disputes may arise over the same unsettled interest in the future.[3:13]

Rights are independent standards about fairness or legitimacy. [3:7] Sometimes they are codified, other times they are socially accepted standards. The interpretation of rights is sometimes a matter of dispute. It is difficult to settle a rights issue if both parties are deeply committed to their position. Unfortunately, this sort of dispute must often be resolved by the courts. [3:7]

Power is the ability to coerce. [3:7] Power is an important issue in understanding negotiations. The situation may involve actual power, or perceived power. Both influence the attitude, concessions and behavior of the parties. [3:8] Short-sighted negotiators may overuse the power issue, and ultimately end with a settlement that leads to repeated

disputes and poor relationships for the length of the contract.

Planning should take into account the different interest, right and power issues, as well as the formally written issues and positions. Negotiators should evaluate acceptable outcomes for their ability to settle interest, rights and power issues against their transaction costs, outcome satisfaction, long term effects and possible recurrence of the problem. [3:11-12]

Once the initial planning is done, the negotiation process begins with the opening offers. This part of the negotiation can set the tone for the rest of the negotiation. It is important not to get locked into an extreme position early in the game. The psychology of who makes the first offer is important to opening strategy and should be carefully considered in the planning stage. [13:128]

Howard Raiffa, in his "Art and Science of Negotiations", calls the next stage the 'negotiations dance'. This is the give and take portion of successful negotiations. During this stage, the negotiator should listen to the opposite party, make and receive concessions and reassess positions in a search for mutually acceptable alternatives. The goal of this stage is to step into the other party's shoes, and reach towards agreement without compromising the essential requirements of your own position. [13:128]

The final stage in negotiations is the end play. It leads to the final results, if the negotiations end in agreement.[13:129] The final agreement should be within a BATNA, or best alternative to a negotiated agreement.[9:104] In successful negotiations, the final agreement should be acceptable, although not necessarily agreeable to both parties. Once a commitment is made, the agreement must be formalized with a contract modification or other official agreement document. [13:130] In public disputes, settlements must be within regulatory and statutory limits, and must safeguard the public trust.

The advantages and disadvantages listed below pertain to unassisted negotiations. However, most of them also pertain to assisted negotiation processes.

One of the principal benefits to negotiation is that the parties control the process. This allows the negotiators to be flexible in their search for solutions that resolve not only issues but interests as well. [53:42]

The process control by managers leads to a high rate of compliance. The parties work out their own solutions. Underlying issues may be explored and resolved. Parties commonly leave successful negotiations satisfied that they influenced an acceptable outcome. [53:42]

Negotiations also have the potential to generate faster solutions than the courts, especially when the parties are motivated to settle by a deadline. [45:45]

As with all processes, there are some barriers to negotiations. First, negotiations cannot occur if the parties are unwilling to talk, or are so entrenched in their positions that they are not willing to concede anything. [45:44] This seldom occurs early in the dispute. However, positions characteristically harden as time goes on, making unassisted negotiations difficult or impossible.

Negotiation is not mandatory. The Government cannot compel participation, or require settlement. This is a barrier if the claimant will not negotiate or a binding settlement is required by the agency hierarchy. It can be argued that any issues settled during negotiations are additional issues which won't be litigated. It is risky for a contract official to undertake negotiations, knowing the dispute may not settle. In a world of limited resources, it is hard to justify a long unfruitful negotiation. [53:42]

One party or the other may end up settling for weak or unbalanced outcomes. [53:42] Certainly, the outcome of negotiations may hinge on the power of the parties, or the expertise of the negotiators. Within the Government, it is risky for an inexperienced contracting official to face experienced contractor negotiators. It may be equally risky

for a small contractor to negotiate against the Government. Many times the parties will end up taking their chances with the impersonal court system, which they believe will at least protect their rights if not their interests.

Negotiations are unsuitable for cases which need to establish precedent or public standards. [53:42] This is the case with almost any form of ADR. Some cases belong to the courts because of deep social issues which should be adjudicated or the potential impact on many interest groups or cases. In these disputes, the contracting official should 'render unto Caesar' his due right to decide.

2. Facilitation

Facilitation is the use of a third party neutral to provide procedural assistance or assistance with the process alone. The facilitator helps negotiating parties communicate. He/she does not get involved in any substantive issues, but rather helps the parties sort out their interpretations until they reach agreement. [53:45] Throughout the negotiations, the facilitator will remain impartial to the issues. [45:70]

Facilitators are almost exclusively communication experts. They almost never volunteer an opinion. Instead, they help set up the process, by ensuring the parties know their desired outcomes, agenda, meeting place, time restrictions, participants and rules for any exchanges. Once the process starts, the facilitator's job is to keep the

parties moving toward their objectives and help both parties listen to one another. [7:152]

This process is similar in many respects to mediation. However a mediator will get involved in the information exchange between the parties, actively looking and suggesting compromises based on what the parties have said. The facilitator does not get involved in the negotiating exchange. Instead, he keys in on the process and communication aspects of the negotiation. He keeps the conversation going and frequently does the recording and monitoring. This allows the negotiators to give their full attention to the substantive issues. [45:70]

The facilitation process is much more than just hiring a person to keep everyone talking and on schedule. There are a large number of communication skills that the facilitator can use to improve the quality of the negotiations. The example below illustrates some of the many techniques a facilitator could use.

The case was that of proposed subway through an endangered marsh area. A facilitated negotiation was held between environmentalists and planners to reach a mutually agreeable solution to the dispute, which was highly emotional and quite complex. [7:153]

The facilitator helped the participants reach an agreeable solution using numerous communication techniques.

For example, in a problem solving mode, the facilitator teamed up the designers with the environmentalists, so each could experience the other's point of view. Another technique involved opinion surveys between meetings, to clarify the issues. Ultimately, the groups reached a satisfactory agreement with the help of the facilitator. [7:157]

There are a number of benefits to facilitation. First, it will provide an acceptable process or procedure for parties who cannot agree on how to discuss their differences. Simultaneously, the procedure will often free the negotiators from the details of the procedure, such as recording information and setting up meetings. [45:71]

The process focuses on meeting the procedural and psychological needs of the parties, as well as the actual substantive issues. [45:71] For example, many of the wildcat strikes in the coal industry were started because miners were not satisfied with the formal arbitration procedure. Their official forum was unsatisfactory, so the miners resorted to strikes as a way to express their grievances. There are certainly similar cases in the contract arena. A facilitated process can often provide that satisfactory forum for the parties, and let them reach an agreement. [45:71]

Another benefit to facilitation is that the process can accommodate numerous parties and their different opinions.

[45:73] This makes it potentially useful for situations involving more than one contractor.

Facilitation does have disadvantages. It is limited to disputes which do not involve highly polarized positions or intense animosity. Since the procedure requires the parties to negotiate the issues without substantive opinions from the facilitator, a certain amount of trust and working relationship is required for facilitation to be effective.

[45:74] As a note, if facilitation does not work, it is simple to transform the process into mediation, which can provide more assistance in resolving unproductive conflicts and exploring alternatives than facilitation.

Facilitation is also not appropriate if the parties feel they need substantive help or a third party to actively resolve conflict. For instance, when parties have entrenched positions on highly technical issues, the dispute would be handled more effectively by another ADR process.

3. Mediation

Mediation is the use of a third party neutral to assist in settling a dispute which the parties are unable to negotiate alone. The third party neutral has no decision making authority. Instead, he/she works to help the parties negotiate a settlement which is acceptable to all sides.

[45:76]

The use of mediation has been around for 4000 years. Written Sumerian codes called for a 'mashkim' to mediate a claim initially. If the mashkim failed, the case went to adjudication. [35] In this country, mediation has been used extensively in collective bargaining and labor disputes for decades. It has expanded into many areas recently, including family disputes, environmental disputes and budget disputes. [34:255] Several Federal courts of appeal and many district courts have established mandatory mediation for certain specified types of cases. [42:30]

Mediation provides assistance with the procedural elements of settling a dispute. The mediator helps the parties reach a goal using a variety of techniques. Initially, the mediator can provide neutral suggestions for an acceptable process, and keep the process on track. This is basically the facilitating part of mediation. On a deeper level, the mediator is an impartial and confidential ear for the parties, who can identify flaws in entrenched positions, identify potential areas for agreement, stimulate the parties to explore other options, and deflate unreasonable attitudes. Finally, the mediator can articulate the consequences of not reaching agreement and assist the parties in overcoming the final hurdles to a satisfactory agreement. [13:108-109]

The process is flexible, but has some generally identifiable stages. At any point, the mediator may be

meeting solely with legal counsel, or a combination of legal counsel and the clients.

The initial meeting is to lay the groundwork for the process, and stress that the mediator will be an impartial and confidential party. During the initial meeting, the mediator may encourage some information exchange, depending on the willingness of the parties to begin talking. [8:42]

The next step is to create a bargaining atmosphere between the parties. This step is an important one in determining the effectiveness of the overall process. The mediator must get the parties involved in searching for areas that are negotiable, and expand these areas gradually to cover all the issues. Simultaneously, he keeps the parties from becoming entrenched in rigid positions.[8:43]

At this point, the issues in dispute must be identified, including the hidden interests. This points up a major strength of mediation. When the parties address the underlying issues, the solutions are more likely to lead to long term satisfaction. This may be contrasted to the short term satisfaction gained from the limited solutions adjudicated by the courts. Mediators may have to meet privately and jointly with both parties, over a period of time to accomplish a mutually acceptable solution. [8:47]

The mediator continues to explore areas of potential settlement. He may offer alternatives, provide opinions,

encourage caucuses, or meet separately and confidentially with both parties. The mediator keeps information confidential upon request. The mediator also uses deadlines as another tool to keep the parties moving towards settlement. [8:51-52]

If the process is a success, the last stage is closure. At this stage, the parties should have the authority to settle. This is often a problem within the public sector, since authority may be disbursed. Settlement agreements must be recorded and enforced, once they are reached. [8:56-58]

Mediation has a number of advantages and disadvantages. The skills of a trained mediator can go a long way toward solving a dispute satisfactorily. In a study done comparing small claims adjudication with mediated settlements, claimants and defendants were more satisfied with mediated settlements. Only 8% of the plaintiffs who lost a court case thought the process was fair, as opposed to 53.8% who lost a mediation case and still thought the process was fair. Additionally, compliance with the verdict was higher for mediated cases, regardless of whether the verdict was considered fair or unfair. [11:132-135]

It should be emphasized that mediation is aimed toward settlement to the satisfaction of the parties. The mediator does not allow personal bias to enter into the process. The emphasis is toward acceptable solutions, not towards compliance with set rules and structures.

Another important characteristic of mediation is the avoidance of positional bargaining, or give and take based on set positions. One excellent example given by Fisher and Ury in "Getting to Yes" involved a husband who wished to build a modern ranch house with a garage, and a wife who wished to build a two-story house with a chimney and bay window. Both were unable to negotiate. Both were clinging to their mind pictures of the perfect home. At this point an architect was employed to design their house and mediate. His solution was to find out their interests. For example, why did the husband want a garage? What design would suit his needs instead of a garage? By drawing out the reasons for the positions, he was able to design a house which met both sets of interests, and avoided the positional stalemate.

Mediation allows the parties to have the benefits of negotiations by assisting the negotiations process. These benefits were listed above as:

1. Parties control the process.
2. Interests, not just issues are resolved.
3. More confidential than the courts.
4. Higher satisfaction rate.
5. Higher compliance rate.

Mediation is more effective in establishing and maintaining a dialogue in cases where the parties are unable to negotiate unassisted. Mediation also helps smooth out

hostilities during the process, leading to friendlier long-term relationships.

The disadvantages to mediation include many of the negotiation disadvantages. It is not mandatory, therefore the parties must be willing to negotiate in good faith. It is not a guaranteed settlement, which means it could simply lengthen the dispute process. Mediation also has the potential for providing a poor outcome, though the mediator can act as a balance to unequal power positions at the negotiating table. Mediation is also unsuitable for any cases needing precedent or uniform decisions.

A potential weakness of mediation is the length of time it may take. Unless the parties have set a deadline, and are actively committed to the deadline, the procedure may take months. Integrative solutions are more satisfactory than adjudicatory ones, but they may take time to develop, especially if the parties are more used to adversarial dealings.

4. Mini-Trials

The mini-trial is a process which involves negotiation and factfinding methods. Essentially, it is a non-binding hearing, attended by representatives of both parties, who have settlement authority. Information is exchanged, and the parties attempt settlement, usually with but sometimes without a third party advisor.

The process was created in the late 1970's, as a result of a patent infringement suit between Telecredit and TRW. [43:1] Since then, a number of large companies have used the procedure, including AT&T, Borden, Shell Oil, Texaco, Union Carbide and Xerox. It is the most popular ADR method among corporations in a study done by the Center For Public Resources.[58:8]

In 1982, NASA pioneered the use of a mini-trial in the Federal Government using a rather spectacular case. In the late 70's, NASA had issued letters of direction on a fixed price contract involving a tracking and data relay satellite system. The contractor was Spacecom, a joint venture of two larger corporations.

Six items came under dispute, including the need for continuous communication support, and accounting for known errors in location data from NASA, and software and computer capability. The claim involved extremely complex, technical considerations. The case had been tied up in extensive discovery and pretrial preparation for several years, when TRW, a major subcontractor to Spacecom, recommended the use of a mini-trial. NASA agreed and the process was started. The mini-trial was held and the case was settled in a few days to the satisfaction of both parties, saving an estimated \$1 million in legal fees. [30:16]

In 1983, the Department of Justice initiated a mini-trial pilot program for government contract disputes. [26:590] The Corps of Engineers picked up the procedure in 1984, and has used it successfully in numerous mini-trials. The second mini-trial held by the Corps was a \$55.6 million claim on a waterway construction. The claim was resolved in two sessions for \$17.2 million. However, the interesting aspect of the case was the 'hotline' inquiry on the settlement which kicked off an IG investigation. The IG found the settlement to be appropriate, even laudable, but was concerned that the documentation concerning the basis for settlement was inadequate. The IG recommended the Corps rework its documenting procedures for pre-negotiation and contract settlement. [46:3]

The next DoD agency to use the mini-trial was the Department of the Navy. Secretary of the Navy, John Lehman, approved a screening of all Navy claims for ADR procedures in 1986. Since then the Navy has settled two claims with mini-trials, narrowed the issues with another mini-trial without settling and initiated two more which were settled before the hearing was held. [26]

Mini-trial is a misnomer. The process is not a trial. It is instead a "structured form of negotiation". [58:1] Senior management hears information on the essential elements of the dispute in a short period of time. The process is

designed to encourage exchanges which will lead to settlement. Some mini-trials involve third party neutrals, while others do not.

The following are the normal elements of a mini-trial. It should be noted that the procedure is characterized by flexibility. Both parties may agree to omit or restructure some of the characteristics.

The procedure is divided into stages. The pre-negotiation stage allows the parties to agree on the process details and prepare their positions. The conference presents the evidence and information exchange. Finally the negotiation sessions begin which hopefully lead to settlement. Either party can terminate at any point, and resume litigation.[58:16]

Most mini-trials begin with the consent of all parties. It is predominantly a voluntary procedure, although courts in Michigan and Massachusetts have begun ordering a mini-trial procedure.[43:7] Within DoD, it is strictly a voluntary process.

The parties in dispute enter into an agreement. The agreement spells out the specific process, including the identity and roles of participants, time limits, length of discovery, schedule, and procedures. Agreements allow the parties to decide how they will run their procedure, but also

take too long to train the advisor. [30:17] Usually, use of a neutral is advisable, to help the negotiators over stumbling blocks, clarify strengths and weaknesses, and provide a communication link between parties if hostilities erupt. When a neutral advisor is used, the parties should clarify his precise role. [58:12]

The schedule is one of the most important parts of the agreement. Both sides should limit the hearing to a few days at most. Parties can condense the schedule by limiting discovery, limiting or deleting witness cross-examination, condensing presentations, rebuttals and closing arguments, and finally limiting the negotiating time. If there is an honest desire to settle, most claimants stick to the schedule.[58:14]

Finally, the agreement should settle the question of confidentiality. If the mini-trial is terminated, the parties will go to trial or in front of a BCA. Both sides would be understandably reluctant to have their negotiations presented in court. For that reason, most mini-trial agreements specify that the neutral cannot be brought to court to testify, and statements made in negotiations are confidential.[58:14]

The conference or hearing is the forum for information exchange. Typically, the schedule involves opening statements, presentation and rebuttal/questions for both parties, closing arguments, an open question period, and possibly an opinion

from the neutral advisor. During the conference, both sides are usually represented by legal counsel. [58:14]

The final stage is the negotiation between the senior representatives. Legal counsel and staff are not ordinarily present, but may be consulted in another room as needed. The neutral advisor may be present, if the agreement specified his presence. Most mini-trials result in an agreement at this point. [58:15]

Government mini-trials must be documented. The agreement, basis for settlement and positions have to be clearly spelled out in writing, because of the potential for audits and investigations. Equally important is the need to justify the expenditure of additional Government funds. [43:21]

Mini-trials have a number of advantages and disadvantages. Speed is the first advantage listed for the mini-trial. Specifically, this means that the mini-trial is much faster than comparable court time. The mini-trial is often used to settle large complex claims in a fraction of the time used for litigation. The conference and negotiations last only 1-3 days on average, and the period of discovery is approximately 90 days or less. This feature alone makes the mini-trial an attractive alternative. [43:47]

The next advantage is the cost savings associated with the process. The ABA polled nineteen lawyers on mini-trials.

Their findings indicated that mini-trials cost only 10-15% of the estimated cost of full-blown litigation. Some estimated they saved between \$300,000 and \$400,000. These cost savings come from several sources. First, a shorter dispute costs less. Next, companies may use in-house expertise during the trial versus hiring additional legal expertise.[43:47] Finally, within DoD the Government can save money by shortening the period, and therefore the amount of interest due on the claim, should the contractor receive all or part of the award. The defense contractor may save by shortening the amount of time he has to perform the contract, since under the disputes clause he must continue performance and is accruing cost he may or may not recover.

A third major advantage is the flexibility of the process. The courts and boards are governed by rigid formal processes. Although the mini-trial is also governed by firm rules and procedures in most cases, the difference is the parties set the rules themselves. Both parties may settle their dispute in a setting and process that they chose.

In addition to choosing the process, the mini-trial allows management to participate and control the settlement, instead of leaving it to lawyers. Control is most important. The settlement authorities control the process and the outcome, which is much more satisfactory than relinquishing the decision to a third party. [50:Section VIII]

The process lends itself to discussions and resolutions of the actual issues at stake. Litigation often degenerates into legal battles that do not get to the heart of the matter. Mini-trials focus on the real technical and business matters. The resulting settlements are normally acceptable to both parties, and have addressed the underlying problems. [11:272] Consequently, mini-trial settlements tend to generate solutions which hold up over time without costly re-litigation.

The Government is ruled largely by bureaucracy. Any ADR decision, especially those involving large sums is subject to criticism, audits and investigations. However, an advantage of the mini-trial is the formality of the procedure, once an agreement is reached. This formality is likely to make the mini-trial appear respectable to those questioning settlements outside of the courts or boards. [50:Section VIII]

The mini-trial is attractive to some because it lessens hostility. The relationship between the Government and defense contractors is often adversarial. Long court battles and the requirement for the contractor to continue working after a claim is filed tends to fuel the antagonism. The mini-trial process is much less adversarial. This is critical in many long-term contract relationships, especially with the large defense contractors on major weapons. [50:Section VIII]

Finally, the process is voluntary. Normally, both sides want to be there, and are honestly committed to finding a solution that is satisfactory to all parties.

The process also has a number of disadvantages. First, as with many forms of ADR, it is difficult to convince the other side to use a mini-trial. Most lawyers are not familiar with the process and believe the other side may have an advantage. Some parties may also believe they have a clear case and there is no room for negotiation. [43:33]

The process is still time-consuming, although clearly not as much as a court battle. It becomes more difficult for agencies or companies that have never used the process, since they must learn from scratch. Since the mini-trial involves fairly extensive preparation, and several days of executive time, it is not well suited to small claims, (under \$100,000). However, it is noted that lawyers who have used the mini-trial generally believe that smaller claims could be solved with a mini-trial if both parties are committed to settlement. [43:48]

The confidentiality of a neutral advisor's opinions and documents used during the trial is not fully resolved. Settlement discussions are not subject to discovery in a subsequent trial, if the mini-trial process breaks down. However, a third party may compel disclosure for other

litigation. For example, in Grumman Aerospace Corp v. Titanium Metals Corp., the court allowed fact-finders to be subpoenaed for an unrelated dispute. The confidentiality of the mini-trial is reasonably safe for the actual dispute. However, the records and opinions of the neutral advisor may not be confidential on other disputes. [43:36]

Witness credibility is not tested well during a mini-trial. Since there are no rigid rules of evidence, and questioning is informal and limited, cases involving factual issues in concert with credibility issues are inappropriate for mini-trials.[11:276]

One risk a party takes is the other side is using the mini-trial to drag out the dispute or to simply test the case of the other side prior to appearing in court. The process is voluntary, so the dispute could end up in court if one party is not participating in good faith.

Finally, the mini-trial may not save significant time or money if the case has progressed too far in discovery. The earlier the mini-trial is started, once issues are clarified, the greater the savings for the Government. [11:275]

5. Dispute Resolution Panels

The dispute resolution panel (or board) is a voluntary process that uses a panel of independent technical experts, retained to review disputes and make a non-binding recommendation to the parties on its resolution.

The dispute review panel has been used by certain states in the past for large construction projects. It was first used within the Federal Government by the US Army Corps of Engineers.[47:25] . The Corps was searching for an alternative to mini-trials because of the resistance in the field to the procedure. One of the alternatives was to use technical experts to advise the parties. It was felt that in certain cases, this procedure would be more efficient and more palatable to the technicians in the Corps.

The process is initially set up to handle problems at a very early stage. The parties must agree in advance that certain types of disputes will be handled by the panel. Following this agreement, the details of funding are addressed, like panel salaries and travel expenses. Next, the panel members are chosen. Within the Corps of Engineers, the contractor and the Corps officials each choose one expert, who in turn select the third panelist. [40:39] The parties choose the first two from names submitted by the other party, and the third name is chosen from a list of names generated by the Government of well known experts in the field. The names are chosen based on technical, not legal expertise. Panel members cannot have been employed by either party for two years prior to the contract, and cannot have a financial interest in the contract. [57]

The following is the procedure used by the Corps of Engineers. It should be noted that the general process may be easily tailored to specific agency needs.

Once a dispute arises, and the contracting officer has rendered an initial opinion, the contractor may submit it for a COFD or alternately give it to the dispute panel for an opinion. The contractor must submit it to the panel within 30 days. If the contractor chooses the panel, a hearing is held. Both sides present the facts of the matter to the panel, who then has up to 30 days to provide an opinion. Both parties then have 30 days to accept or reject the decision. [42:35] As with any dispute, the claim must be made within the requirements of applicable statutes. For example, the contractor must certify the claim is accurate and complete for all claims over \$50,000.

Members of the panel need to keep current on the panel's contract. One method is to visit the site quarterly, and get briefed on the latest status. The panel members can also meet regularly with the Government and contractors. [57]

The Corps model may be modified. For instance, the number of experts could change, or the review period could be shortened or extended. The contractor and the Government could decide to automatically submit certain claims to the panel, or could have additional review. It is even feasible to have legal as well as technical expertise represented on

the panel, although the Corps uses the panel only for technical matters.

Perhaps the greatest advantage of the procedure is that it allows disputes to be handled almost immediately, before hostilities arise and positions are solidified. [40:39] Early handling of disputes is recommended by almost every ADR expert, whenever possible, since it costs less in legally related expenses, and lessens tensions.

A second benefit is the ease of access for the parties. The panel is hired by the parties, and is in place, so scheduling problems are less of a problem. The procedures are also in place, which saves negotiations on the process details. Both contribute to less disruption and better working relationships. [40:39]

The process consumes less time than many methods. It also is clearly allowable within statutory limits, since it is purely advisory and limited, (in the case of the Corps of Engineers) to factual matters. [42:36]

Finally, the process uses respected neutral advisors, hand picked by the parties for their expertise and other attributes considered important to the respective disputants. They are also current on the technical details and history of the specific contract. Therefore, their opinion is highly credible. Parties would be likely to listen to the panel's opinion over other experts. [45:87]

However, the procedure is currently limited to factual matters, although the potential does exist for legal matters as well. This is not a disadvantage, merely a limit on the effectiveness of the procedure over other possible procedures.

A perceived disadvantage is that the contractor may be more inclined to dispute because a forum is easily and readily available. However, there is no empirical evidence for this, since the process is very new. It is merely a consideration at this point. [42:36]

Another disadvantage is the potential cost of keeping the panel current. The process is clearly geared to large contracts, with a history of conflict. For example, the construction industry commonly disputes site conditions, so large construction contracts historically have a history of conflict. It would be impractical to retain this sort of expertise for small single contracts. [42:36]

Finally, the procedure does not allow for the parties to discuss underlying problems. Therefore, it is an inappropriate method to use for cases requiring integrated solutions.

6. Advisory Mediation

Advisory mediation is an interesting hybrid involving mediation and arbitration. The process is non-binding. It involves using a mediator to resolve the dispute. If the parties cannot reach settlement, the mediator renders an

advisory opinion on how she feels the dispute would be resolved in front of an arbitrator. [11:256]

This process is very new. It was developed by Stephen Goldberg in 1980, to assist the labor grievance process in the coal industry. Goldberg had been a labor arbitrator for 5 years, and was surprised at the number of unnecessary cases brought to arbitration. He began looking for a better system. He initially drew from the work of Robben Fleming, who had matched student arbitration decisions with his own experienced decisions, and found a high percentage of correlation between the two. Goldberg felt if inexperienced arbitrators could make a match, then experienced arbitrators could definitely predict a match in many cases. He therefore proposed adding an immediate, oral advisory opinion to the grievance process, before it formally went to arbitration. [3:137]

Goldberg envisioned using the advisory arbitrator as a mediator before the final opinion was given. As his idea matured, he began to place more emphasis on the mediation portion of the procedure. The increased emphasis was based on advice from other ADR experts, and on studies showing mediation was highly successful in mediating grievances. (Some agencies showed as high as 88% success.) Ultimately, the procedure required the advisory opinion be given only if the mediation attempts failed. [3:140]

The procedure was piloted in the coal industry in June, 1980. [3:141] Acceptance was slow. Unions and companies had to be coaxed and convinced into giving the new procedure a try. [3:144] This is a highly relevant point for any new ADR technique. People are comfortable with a tried and true procedure, even if they do not like it. To get acceptance, the procedure must be sold, the process must have a framework, and it must show advantages over the alternative.

Once it was piloted, advisory mediation was a success. A staggering 89% of the 153 initial cases were settled by mediation. Union officials who tried it, were polled. They stated a 7 to 1 preference for advisory mediation over the traditional grievance procedure. Another benefit was the new process was faster. It took an average of 15 days compared to the 109 day average for arbitration. Finally, an appraisal of the process after 6 years showed that the approach to grievances in the coal industry had begun to change. The approach had gone from almost automatic arbitration of any grievance, to a problem solving approach between the unions and management which emphasized integrative solutions early in the dispute. [3:157-159]

This hybrid process has potential in the contract dispute arena. The parties in dispute could mediate until they reach an impasse. At that point, the mediator gives an impartial oral opinion on the outcome of the case if the

parties choose to go to the ASBCA or the courts. This opinion can be used for further negotiations or can be rejected and the formal CDA procedures used. An opinion should only be given when the parties have stopped negotiating. Obviously, once an opinion is rendered, the suspense is gone, and the mediator loses some of his procedural authority and a lot of his impartial standing. For that reason, the initial agreement between the parties should clearly specify the mediator will be used for procedural assistance only, unless he needs to give a substantive opinion at the very end.

[45:86]

Although mainly tested in the labor arena, the success of advisory mediation lies with its ability to provide the parties with many of the benefits of mediation, including process control, outcome control, integrative solutions and the lessening of hostility. It also allows the parties the ability to forecast the future results of more binding forums like the courts. Overall, the average match between the actual outcome and the advisory opinion is 80% in the labor grievance field. Although there is no empirical evidence the match would be as high with contract disputes, the initial results are high enough to lend credibility to the process.

[45:86]

Another benefit to the procedure is the potential for savings in legal costs and time. Once again the empirical

evidence is limited to the labor field. Small claims courts which use mediation, then non-binding arbitration to solve small claims have reported lower costs and less time as well, but the savings depend heavily on volunteer mediators and arbitrators. [44:2]

The process has certain drawbacks. Advisory mediation should not be used in cases requiring precedent, or in cases which must develop public standards. Like mediation, advisory mediation seeks settlement based on agreement. This makes it susceptible to compromises which may not hold up to agency or Federal requirements.

Specific disadvantages to the process revolve around the advisor. First, the mediator may provide an erroneous advisory opinion which is accepted by the parties. [11:260] Contracting officials would have to be ready to factor that risk into any decisions. Secondly, the advisory opinion may strengthen the resolve of the 'winner' to cease negotiations, and proceed to the BCA or court. [11:258] However, the process shows promise, possibly in the small claims area, since it was originally devised to solve small grievances.

7. Fact-finding

Fact-finding is an impartial decision on some or all of the facts in the case from a neutral advisor. The fact-finder often researches the facts, and may come up with data unknown to any of the parties. In almost all circumstances,

the fact-finder is a recognized expert on the subject being disputed. [18:5]

This is a very simple method. Many Government contract disputes are very factual.[40:33] The contracting officer and the contractor may get locked into a disagreement on the facts, including the impact of environmental factors on a dispute, the technical interpretation of a contract specification or the amount of an entitlement.

The essence of fact-finding is to receive a report from an expert neutral who is acceptable to both parties to get a new perspective on entrenched positions. The actual process may entail the use of several experts. The process may involve formal hearings in front of the experts, or the hiring of a neutral to do independent research on the issue using interviews, general technical knowledge, industry standards and available documentation. [45:87]

The parties should decide precisely what they want in the report. The options include:

1. Presentation of all relevant data without a specific recommendation on settlement.
2. Presentation of all relevant data with a recommendation either on the process to use to settle, or specific recommendations for settlement. [45:87]

Usually fact-finding is used in conjunction with a negotiation process, although it is possible the parties may settle using a fact-finder's recommendation.

Fact-finding has advantages and disadvantages. Perhaps the chief advantage of fact-finding is that it allows the parties to use an independent person to assess the conflicting viewpoints of a number of experts. This person is familiar with the language and values and general practices of the technical community he represents. Therefore, he can interpret the data and make a recommendation or a report based on more than just testimony.

Fact-finding also allows the representatives of the party to take a clearer look at their positions. This can help break a deadlock.

There are some disadvantages as well. As with any substantive assistance, the neutral may offer an opinion which is accepted by the parties, but later proves to be erroneous. This is a calculated risk taken by the disputants.

This form of dispute resolution is by its nature limited to factual situations. However it is often used in conjunction with other dispute resolution methods, such as negotiation.

The success of fact-finding hinges partially on whether the parties can find a neutral who is acceptable to everyone. This may be difficult in some situations.

8. Settlement Conferences

The settlement conference is an ADR technique which uses a judge as a third party advisor and mediator during pre-

trial negotiations. The judge used is not the trial judge, although outside DoD, many settlements are mediated by the trial judge. Although the settlement conference may be an issue raised in a pre-trial conference, it is not a pre-trial conference. It is instead, a non-binding procedure which allows the parties a final opportunity to reach settlement before trial.[45:88]

The modern settlement conference originated in Scandinavian countries, as an effort to solve disputes using local norms. The procedure migrated to the United States early in this century. Courts attempted to reach pre-trial settlement using community values as a base. Gradually, the process became oriented towards helping clear congested court dockets. [33:490]

In 1938, the Government adopted Rule 16 of the Federal Rules of Civil Procedure. [33:491] Rule 16 sets out the procedure for the pre-trial conference, which is a conference to handle administrative details before the trial, including case review, number of expert witnesses, discovery orders and issue specification. [1:179] The rule does not specify settlement as a point of discussion, yet subsection 6 calls for consideration of "such other matters as may aid in the disposition of the action". This is interpreted by many as the authority to attempt settlement. [1:180] Since 1938, the

use of the settlement conference has grown, and has even been made mandatory in some state courts. {36:493]

Inside the Government disputes process, the Claims Court has adopted a General Order which allows the voluntary use of a settlement judge. If the parties decide to use the judge, he will hear a shortened presentation of the case, and generate discussion between the parties. The judge may also give an advisory opinion on the strengths and weaknesses of the case. This opinion carries some weight, since it is essentially legal advice. This advice allows the parties to judge how their case might actually fare in court. [18:5]

The use of a settlement conference may be initiated by either party. However, it is usually recommended by the judge during a pre-trial conference after negotiations have failed. If both parties agree, it is scheduled. The lawyers, with or without their respective clients, will negotiate with a judge's assistance. The parties can cease negotiations at any time and take the issue to litigation without repercussion.[1:178]

Many lawyers believe that certain types of judicial involvement in settlement discussions improves the chances for settlement. In a 1984 study, 85% of the lawyers polled believed that judges helped settlement when they actively analyzed the case and provided opinions or suggestions based

on the analysis. They did not believe that judges who used standard compromise formulas helped settlement. [33:499]

The settlement conference has advantages and disadvantages. First, like any negotiated or mediated settlement, the parties have some control of the outcome, which usually leads to greater acceptance of the final agreement. [33:502]

Settlement conferences assist the parties in 'reality testing' their case. Lawyers can use this device if their clients are being stubborn on a weak position, and managers can use it as a means of testing the legal advice they are receiving. [45:89]

The process allows the parties to gain many of the benefits of mediation, including a neutral to help break an impasse and a forum which allows better relationships in the future than the courts. [45:78]

The process helps the parties to avoid the legal costs of a trial. However, it should be noted that legal fees and costs become greater over time, and the settlement conference is usually held as a last resort to litigation. Therefore, the savings are not as great as they would be if the dispute had been handled by another ADR process at an earlier time. The value and risks of a negotiated settlement should be carefully weighed against those of a litigation settlement before a decision is made to settle. [45:90]

The parties may be able to save time. This would be desirable only if the trial is expected to take a long time.

The settlement conference does have certain disadvantages as well. It is not applicable to those cases where mediation is inappropriate, including those which require precedent or those cases where there are no issues to negotiate. It is not as appropriate for cases which hinge on highly technical rather than legal issues, simply because the normal judge's expertise lies in the law, not specialized technical fields.

Care must be taken to avoid settling cases by the 'Lloyds of London' formula, where the judge asks the parties to split the difference within a reasonable range, or some other predetermined formula. This type of settlement can improve the efficiency of the process at the sacrifice of the quality. [33:508] Generally, the parties should be careful of being pressured into acceptance of a settlement simply because it is so close to a trial. Instead, the settlement should be analyzed carefully on its merits, before acceptance, rejection, or as a basis for further negotiations.

9. Non-Binding Arbitration

Arbitration is an adjudication process which has more informal characteristics than judicial proceedings. It is defined as:

A process by which parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal. The parties agree in advance that the arbitrator's determination, the award, will be accepted as final and binding upon them." [20:70]

Non-binding arbitration is basically the same, except the decision is not final.

Arbitration became respectable in World War II. The Government could not afford labor strikes or lockouts that would interfere with the war effort. To prevent work stoppages, Congress mandated that industry use either the option of voluntary arbitration by mutual agreement or mandatory arbitration by a War Labor Board. The procedure gradually became an integral part of labor relations proceedings. [2:15-16]

While labor arbitration became prominent quickly in the flames of a world war, commercial arbitration has evolved more slowly for industry. Some industries began using arbitration because of their special nature. The New York Stock Exchange could not afford prolonged court battles because of their volume. They institutionalized arbitration. The textile industry began using arbitration because of their dependence on repetitive sales and customer goodwill.[2:28] Over the years, other industries have followed suit, realizing arbitration was less expensive, and less damaging to business relationships.

The arbitration process involves a hearing in front of an impartial expert. During the process, the arbitrator hears the dispute and reviews all the evidence from the two parties. The format of the evidence, the proceedings and hearings and the final decision are governed by flexible rules. Arbitration proceedings may be formal or very informal, depending on the wishes of the arbitrating parties.

Arbitration is performed by one or more arbitrators, usually selected by the parties. Qualified arbitrators are available through industry volunteers or selected from rosters compiled by various organizations. The American Arbitration Association (AAA), is one such organization. They carry over 60,000 neutral advisors on their roles. As a point of interest, some commercial arbitrators traditionally do not accept fees unless the case is extremely complex or long.

The normal selection process gives both parties the choice of their adjudicator. Arbitrators are chosen based on their neutrality, technical and industry knowledge, and any other attributes required by the specific situation. In some proceedings, arbitration is done by a panel. Each party will choose an arbitrator, who will in turn select a third arbitrator known as an umpire. The proceedings are the same as before, except the hearing is conducted in front of a panel instead of a single person. [50:2-3]

Arbitration is conducted under rules set by the parties. Rules developed by agencies like the AAA are frequently used by default, or with minor adjustments. These rules are simple, direct and clear. For example, the AAA's rules for commercial arbitration, from start to finish, take 18 pages. They cover legal topics such as order of proceeding, time, place and judicial review, but are written to allow maximum flexibility for the arbitrator. [39:3]

Once the hearing portion of the process is completed, the arbitrator renders an advisory opinion, which the parties may accept or reject. If they reject the decision, they can use portions of it to conduct negotiations, or take the dispute to court.

A recent category of arbitration is court annexed arbitration. The courts will direct that the parties submit to non-binding arbitration. This gets the parties talking to each other in a less adversarial atmosphere. If either party does not like the final decision, the court will require they improve their claim by a certain percentage or pay additional court costs. Even when the decision is not accepted, it often leads to more negotiation and pre-trial agreements. [50:3]

Non-binding arbitration has its advantages and disadvantages. There are a number of reasons that arbitration is preferred by business in certain cases. First, it can be much faster than using the courts. The average dispute is

settled in 60 to 90 days or less. One large case involving a \$4 million dollar claim was settled in just two days.

[18:48] The arbitration process is faster because the hearing can occur without scheduling into a court docket, and the rules may be informal and skip a lot of procedure.[50:21]

Speed is an important point when considering arbitration for Government contracting. The Commission on Government Procurement found that two-thirds of small business would not appeal claims under \$5000 partly due to the time.
[27:2]

Since arbitration procedures are flexible, both parties can avoid time consuming formalities. The potential informality, and the ability to choose the arbitrator is attractive in many cases. (It must be noted that even non-binding arbitration can become a long formal proceeding if one or both parties do not cooperate.)

Faster, more flexible dispute resolution is less costly. This is often the bottom line for businesses, and should be important to the Government. Lengthy litigation has direct costs, including lawyer fees, judge's time, costs of preparing evidence and court or board administrative costs.

Courts are by nature adversarial. In the business world, a bitter court battle may win a short term victory for one party at the expense of long term relationships. Government should view disputes as rationally as business.

Agencies should encourage any method which lessens the tension between parties, saves taxpayer dollars, encourages contractors to stay in the industrial base and improves future working relationships. Arbitration is one way to settle certain claims in a way that satisfies both parties.

Another advantage of arbitration is the background of the arbitrator. The judge in a trial or board must be educated on the background of the case. The arbitrator does not need technical background, since he is an expert in his field. In commercial arbitration, many arbitrators have decades of experience in the industry. They grasp the nuances and background of the situation quickly, and are familiar with the customs and practices of their field. They speak the language of the industry, while many trial judges do not.

The final advantage to arbitration is the nature of the award. Court awards may be only legal, not fair or appropriate in certain instances. An arbitrator, unlike the courts is not bound by precedent or rigid rules of evidence or admissability. He has more freedom in his decision. Therefore he has ability to weigh and decide on both hard fact and intangibles and can often satisfy both parties.

Arbitration also has its disadvantages. The major disadvantage is the loss of many legal safeguards. Arbitration does not contain the checks and balances of the courts and boards. The claimant who selects arbitration must often weigh

speed and flexibility against the possibility of an adverse opinion. This disadvantage limits the type of cases suited to arbitration.

A second major disadvantage is the lack of uniformity of awards. The arbitrator makes the decisions based on his/her background, not established precedent. This creates an element of uncertainty for parties concerning the outcome of an arbitrator's opinion, although this is not as critical in non-binding arbitration.

Non-binding arbitration basically turns the control of the outcome over to a third party, much the same as in a court. This means that the parties do not have to work out their differences. They can simply rely on another to do this for them. The result is that although arbitration is much less adversarial than the courts, it does not allow the parties to develop integrative solutions.

A final area of concern is the increasing formality of arbitration.

We are a nation addicted to laws. Although many complain about the complexity of the law, the trend in this country has been to pass more laws and tighten procedures. Board proceedings have become increasingly formal and rigid over the years despite the existence of streamlined hearings. The boards have become more formal, partly to protect the rights of individuals because of limited judicial review.

Arbitration carries the same potential. Even voluntary arbitration can become formal when the parties are more comfortable with strict rules of order. There is a danger that the use of arbitration could become as cumbersome as the legal proceedings it replaced. [53:Table 4]

10. Summary Binding ASBCA Procedure

The summary ASBCA procedures developed by the Navy to handle small claims is the only binding ADR procedure which has been found to be legal within DoD. This is because the procedure uses ASBCA judges.

The procedure was developed in 1987. The Navy had begun to experiment with ADR, and had determined that the mini-trial, although useful, was too costly to handle the smaller cases which were a large part of the Navy's workload. The Navy defined the small claims case as being heavily factual, involving only one or two issues, and of small dollar value. [54:5] Therefore, the Assistant Secretary of the Navy (Shipbuilding and Logistics) stated in a memorandum dated 13 July 1987, that Navy contracting officers would afford contractors the opportunity to take advantage of the ASBCA summary procedures for disputes under \$25,000.

Basically, the procedure is relatively simple. The parties motion the ASBCA for permission to process their case under summary procedures. Once the motion is approved, the parties will present their case to an ASBCA judge. The actual

presentation may be flexible. For example, the case may be presented pro se. The actual time is about one hour. Once the presentations are made, the judge decides the case from the bench. The only document is the decision on whether the appeal is sustained or denied and how much is awarded. The decision is binding, since parties must agree ahead of time to waive their right of appeal under the CDA. [47] An alternate method is to have the judge issue a verbal, binding decision without preparing a written decision. [42:37]

Participation in the process is voluntary, but excludes precedential cases. The procedure also allows resolution of small cases in groups. The procedure is similar to the existing small claims procedures at the ASBCA, but is not strictly tied to the dollar limits as are the accelerated and expedited methods. [42:36]

This method has the potential advantage of saving court time. However, the procedure has not been enthusiastically received by industry. No empirical studies have been done to date on the lack of acceptance but the procedure is close enough to the accelerated and expedited procedures under the CDA to allow speculation.

First, industry is reluctant to use binding procedures without the ability to appeal, especially when dealing with the Federal Government. This trend is apparent in the lack of acceptance of binding decisions, and the increasing

formality of the BCA processes to protect litigants rights. The incentive to save some court costs is apparently not balanced by the need for an avenue of appeal, even if the avenue is limited. Finally, the small claims process does not allow the litigant to have much control over the procedure. Rather it passes the control to a third party, perceived to be 'Government', with few of the safeguards inherent in the more formal BCA process.

C. UNUSABLE ADR TECHNIQUES

The following techniques are not applicable to DoD contract disputes for a number of reasons. First, processes which bind the Government using a third party neutral are unallowable. These are binding arbitration and its hybrids such as med-arb, mediation then arbitration and private judging. Several procedures just simply are not suitable to DoD contract disputes by their nature. These are the summary jury trials, regulatory negotiation, neighborhood justice centers and the ombudsman. Finally, pre-dispute cooperative or relationship building techniques are important but cannot be evaluated in this thesis, since there are no criteria if there is no dispute. Each of these techniques will be discussed in this chapter.

1. Binding Arbitration

Binding arbitration is the most common form of arbitration. It is a voluntary procedure, since a process that binds cannot be made mandatory by the courts. Both parties are bound by the final decision of the arbitrator. This finality is backed by law. The United States Arbitration Act backs up the process by allowing review only in the following instances:

1. When there is evidence of fraud, corruption or undue means.
2. When the arbitrators did not allow evidence which prejudiced the rights of the defendant or claimant.
3. When the arbitrators clearly exceeded their powers or were so incompetent that a final, mutual and definite award was not made. [50:4]

The process is almost identical to non-binding arbitration, in theory, except that both parties must abide by the award. However, the finality of the award can predispose the parties toward an extremely formal process. Some critics of binding arbitration fear that its basically adjudicatory nature could eventually lead to rigid and time-consuming procedures to protect the interests of the parties.

Binding arbitration is not currently legal within DoD.

The Government cannot be locked into policies made by third party neutrals, and the GAO has ruled against its use on numerous occasions.

2. Mediation-Arbitration

Mediation and arbitration may be combined in a number of ways to produce a hybrid which combines some of the features of both. There are two common methods of combining the processes. The first is med-arb, which is mediation, then binding arbitration performed by the same person. The second is mediation then binding arbitration where the parties agree to mediate first, then arbitrate if the mediation breaks down. However, different people are used for the mediation and arbitration.

Med-arb has been used extensively in labor conflicts, where the participants are of relatively equal experience. [11:268] This process has been described as 'mediation with muscle'. [11:265] Originators of the idea were looking for a faster, less formal alternative to the labor arbitration process. They believed the med-arb process would provide all the benefits of mediation, with additional clout provided by the threat of arbitration.

Proponents of med-arb state that it provides many of the benefits of mediation, notably the satisfaction with the process which comes with participation. One med-arbitrator has stated that the process has been used in numerous diverse fields of labor as well as in commercial disputes. He goes on to say "Of the literally hundreds of issues involved in

such cases, less than a dozen had to be finally arbitrated by the med-arbitrator." [11:265-66]

The difference between traditional mediation and med-arb comes from the threat of arbitration if the mediation breaks down. Arbitration is more costly, more time-consuming and much more uncertain than mediation, so parties negotiating in good faith have more incentive to avoid it. Med-arb may also prevent superfluous arguing and saber-rattling in front of a mediator who could become a binding arbitrator tomorrow. [7:265]

Opponents of med-arb believe that one individual cannot perform both mediation and arbitration on the same case. They view the processes as distinctly different. On the one hand, mediation is geared towards reaching an agreement that is satisfactory to both parties. This entails exchanging a lot of information related to values and interests and hidden issues. Arbitration, on the other hand is more adjudicatory in nature, with a decision based on facts and proofs and logical arguments. The information exchange is slanted very differently. Critics argue that a mediator, who must then arbitrate would have to 'forget' the material she has heard that is irrelevant to arbitration, and receive more information slanted towards arbitration. Worse, parties may not mediate honestly, for fear that confidential

information may be used against them in an arbitration decision. [11:248]

Mediation then arbitration, on the other hand, using separate persons, is not viewed as a contrary process. Some of the advantages would be the same, such as the ability to mediate first, and attempt to settle disputes constructively between parties, and the impetus to settle because of the threat of immediate arbitration. However, the mediator does not have the same clout as the med-arbitrator.

Both processes have had positive results in settling disputes. However, they are binding processes, and as such are not applicable to DoD contracting disputes.

3. Private Judging

Private judging, also known as rent-a-judge by the irreverent, is the use of a privately selected and paid neutral referee who renders a binding decision on a dispute after a hearing. The procedure differs from arbitration in that the case is referred to the neutral by a rule of the court. Once a binding decision is made, the parties can appeal it on much broader grounds than arbitration. [11:281]

A number of states have adopted the procedure. For instance, in California, certain cases are permitted to voluntarily adopt the private judging process. The California model will be used as an example since it illustrates the general process.

Under the law, the court may allow the parties to voluntarily choose a neutral referee to render a decision on one fact or all the issues in a case, and anything in-between. The parties may use a neutral of their choosing or the court may appoint one if the parties cannot agree. Once selected, and appointed by the court, the referee has almost all the powers of a judge. (The exceptions are contempt findings and the power to appoint referees.) [11:286]

The procedure used is fairly flexible, but may be as formal as a full trial. However, because of the ability to appeal, witnesses must be sworn, substantive law and evidentiary rules must be followed, and the referee is required to submit a written report to the court on the findings. [11:287]

Once the referee decides, the parties must abide by the decision subject to the appeal ability. Referee costs are shared by the disputants. The process allows a trial without the wait, and is attractive to corporations for that reason. Often, the referee is a former judge.

Private judging is a successful tool. However, it is a binding process and is therefore unsuitable for Government contracting disputes.

4. Summary Jury Trials

The summary jury trial is basically a mock trial. The parties in dispute can elect to have their case reviewed by

a jury in an abbreviated trial. The non-binding verdict rendered by the jury may then be used in further settlement negotiations. [11:282]

The process was developed by Judge Thomas Lambros in the last decade. His reasoning was to encourage settlement and reduce the burden on the legal system while retaining the tradition of the jury.[32:52] Several studies since the introduction of the summary jury trial have resulted in tentative findings that it is useful in reaching full settlement before trial. Notably, of 80 cases taken to summary jury, 40% settled before the summary jury trial, and only three went to a full trial. [11:283]

Summary jury trials are intended for difficult cases, where negotiations have degenerated into glares across the table. If the judge believes he can break the deadlock by exposing the parties to the impartial and stressful spotlight of the courtroom, he may recommend the procedure. Quite often, the disputing parties will settle, once they see how their case appears in court. [32:52]

Courts may adopt the procedure under Federal Rule of Civil Procedure 16, which allows extrajudicial procedures to be used in attempts to settle. The basic procedure, once approved, is as follows. The judge rules on the aspects of the trial during the pre-trial conference as she would for a real trial. Counsels submit jury instructions, exhibit lists

and other items three days before the trial. Often a conference is held just before the trial in order to encourage settlement one more time. [32:53]

A jury of six is chosen and the court is convened. The judge briefly explains the process and the case. The jurors are challenged and the final jury chosen. Next, after a five minute overview, the sides have one hour to present their cases, with relaxed rules of evidence. Complex cases usually have more time. Witness testimony is limited to sworn statements. Cross-examination, rebuttal and surrebuttal are limited. The judge then explains the points of law to the jury, the jury deliberates and the verdict is returned. Once the jury has given their verdict, they are asked to comment on the presentations. The entire process takes one day.

Although the process shows promise for cases decided by jury, it is not applicable to Government contract disputes because the forums for these disputes do not involve jury trials. If Government officials wish to get an opinion of how they would fare in court, or in front of the board, they could use other ADR procedures which entail the advisory opinion of a judge.

5. Ombudsman

An ombudsman is defined as "...a third party who receives and investigates complaints or grievances aimed at an institution by its constituents, clients or employees."

[53:46] The classic ombudsman is appointed by the Government. Industry also makes use of the ombudsman. Finally, the media has instituted a variation on the ombudsman in the form of action lines or hotlines, where a complaint is heard by an expert and followed up with the business or agency.[53:46]

The ombudsman institution began in Sweden in 1809, under the new Swedish Constitution, as an office to parallel the Chancellor of Justice who worked for the King of Sweden. This new official was to be the watchman of the officials. He reported to the Parliament. [10:194]

The 'classic' model as developed by the Swedes involved the appointment of an official to investigate complaints against the Government, and make recommendations concerning the complaint. The ombudsman is an appointee, for a fixed term. He is impartial, independent and has expertise in Government. Many countries prefer a lawyer as an appointee. [16:1]

The ombudsman in the Swedish model has limited powers, once a complaint is investigated. He cannot give orders, reverse a decision or reopen a case he thinks was handled incorrectly. However, he can discipline an official for incorrect actions due to carelessness, imprudence or ignorance. The discipline may run from prosecution which is rarely used, to a formal rebuke which is by far the most frequent sanction used. [10:205]

The prosecution powers given to the ombudsman in Sweden are not universal. Finnish, Soviet and Polish ombudsman may prosecute incompetent or negligent officials. In Denmark, the ombudsman can only recommend prosecution. In other countries such as Japan and the United States (state government only), the ombudsman may only use persuasion.

The process was adopted in the United States in Hawaii in 1967. From there it spread to other states.[16:2] One was Nebraska, which characteristically endowed its ombudsman with investigation and recommendation powers only. The ombudsman uses his office to investigate complaints, and attempts to resolve them by working through the various agencies. [16:8]

This process could potentially lend itself to use by an agency in hearing, investigating and potentially mediating contract claims in the early stages. However, as it currently exists, the process is not geared to resolution of contract disputes, and for that reason will not be analyzed further.

6. Regulatory Negotiation

Regulatory negotiation is an ADR method used to establish regulations in a cooperative manner by bringing together the agency and the various interest groups to discuss the controversial portions of new regulations. The goal is to negotiate a regulation that will be acceptable from its conception, instead of extensive challenges in the courts.

It is not applicable to the field of contract disputes.
[29:32]

7. Neighborhood Justice Centers

Neighborhood justice centers are local dispute resolution centers which handle grievances from the local community. The centers employ several ADR techniques, notably mediation, conciliation or med-arb. Cases are primarily landlord-tenant, domestic and neighbor conflicts. The procedure is not applicable to resolving contract disputes.

8. Cooperative Decision Making

The simplest way to resolve a dispute is to prevent it from happening. This is not technically a dispute resolution process, since many of the techniques are used before conflicts arise. The goal is to build a cooperative framework which allows disputes to be settled faster and more amenable. [45:28]

This area of dispute resolution cannot be ignored. Although it will not be evaluated, since a dispute that has not occurred has no criteria, the literature is clear that cordial relationships lead to simpler resolutions once problems arise. Several examples of cooperative problem solving are listed below.

The South Atlantic Division of the Corps of Engineers hosted a round table discussion on ADR with major companies and law firms who do business with them. The purpose of the

meeting was to promote ADR and allow discussion on the merits and obstacles to using various ADR techniques. Two major points of emphasis in a discussion on obstacles included open communication and early action. Participants felt that, "Communication before disputes arise helps head off problems and dispel bad feelings and false perceptions." They went on to say that scheduled communications were important during the project. [56:7]

The participants also felt early resolution was the most effective form of resolution. They felt that as a dispute dragged on, legal expenses grew and positions became entrenched. [56:7]

Early information exchange could be done in a number of ways. The Corps uses a very new technique called 'partnering'. Partnering is done at a conference after contract award but before contract performance. During the conference, the parties discuss how they will handle different types of potential disputes if they occur. The conference is also used to build a feeling of teamwork, establish trust and promote understanding. [65] As stated before, cooperative techniques are important, but not relevant to the boundaries of this thesis.

D. CHAPTER SUMMARY

This chapter discusses the various ADR methods in use today. Certain methods are listed as suitable for analysis in resolving DoD contract disputes. These methods are non-binding arbitration, mediation, negotiation, factfinding, mini-trials, settlement judges, dispute resolution boards, advisory mediation, and the ASBCA small claims procedures. Other procedures are discussed, but have been found to be inappropriate because they illegally bind the Government using a third party neutral, are not processes which can be effectively used in the area of Government contract disputes or occur before an actual dispute arises.

IV. DATA ANALYSIS AND GUIDE PRESENTATION

A. STEPS IN DATA ANALYSIS

This chapter will analyze available data on the differences between ADR methods and the criteria required to choose an appropriate method. The steps in analysis are as follows:

1. The criteria used in choosing an appropriate method are listed and described. These criteria were compiled by an intensive screen of the current literature on ADR. The first six criteria presented are ones which do not help in specific method selection. Instead, they allow the contracting official to decide whether to use ADR over more traditional dispute methods. The rest of the criteria assist in selecting a specific method.
2. A matrix was developed which matched the appropriate criteria with the ADR methods being analyzed. The first matrix table, (Table 1), lists the criteria as (+) or (-). A positive match means the method should be selected and a negative match means the method should not be selected.
3. The matrix is further refined in a second matrix table, (Table 2). This table simplifies the data presentation and codes the matches as completely positive (+), completely negative (-), a mixture of positive and negative matches (D), or no data recorded (N).
4. The six criteria which only show whether to select ADR at all are listed separately. Positive matches (+) mean choose ADR, negative (-) matches mean do not choose ADR.
5. The remaining criteria are broken into three more tables, (Table 3, 4 and 5). Minor changes were made to the order of data presentation. Criteria

are listed from the ones occurring most frequently by method to those occurring least frequently. This way the contracting officer can see at a glance the criteria which affect numerous methods versus those that affect only a single method. ADR methods were also reordered. This was done because some criteria clustered themselves around certain groups of methods such as the negotiation/mediation based methods.

The Table 3 is a positive table, designed to assist the contracting officer in ADR method selection. Table 4 is a negative table designed to help the contracting officer delete certain methods. Table 5 shows the criteria which are divided into both positive and negative data.

6. Once the tables were established, the separate methods were analyzed for broad trends to help the contracting officer mentally group methods together and give him a greater understanding of differences and similarities between the separate choices. This ended the data analysis portion.

B. CASE CRITERIA-DECIDING TO USE ADR OVER TRADITIONAL METHODS

There are 33 criteria analyzed in this thesis to assist in choosing an appropriate ADR method. Six of these criteria apply to choosing between ADR and the traditional dispute process. ADR is not a substitute for the courts. As stated before, it is merely a tool to allow the courts to handle those cases which need judicial intervention, and allow the contracting officer more flexibility in handling cases that do not need the courts. The following criteria will help a contracting official decide whether to use the courts/boards or attempt an ADR technique.

1. Need for Precedent or Public Norm

One of the basic functions of the judiciary is to interpret the law. Certain cases under dispute are linked to many other cases which are waiting for a precedent. Other cases may involve the first test of a law or may be tied to legal issues that would set a public standard. (The most common example used is the civil rights case of Brown v. The Board of Education which helped begin the movement for equality of all races under the law.) These cases should be tried in the courts. They are not appropriate for ADR.

2. Willingness to Settle Using ADR

The contractor and the Government must have an honest desire to settle the case before an ADR techniques may be used. This case criterion has several dimensions. First, the Government must be satisfied that the contractor is not attempting to simply drag out a case. Sometimes the contractor does not want to go to court and will use any excuse to lengthen the pre-trial period. Secondly, the contractor must be willing to use an alternative to the courts/boards, since all the DoD ADR processes are voluntary, and all but one are non-binding. Finally, the contracting official must ensure that his agency is willing to support the use of ADR.

3. Claims without Merit

Some claims from contractors have no merit. For example, a claim which hinges solely on clear legal principles in favor of the Government, is not appropriate for ADR. The same is true for claims which border on fraudulent, or are viewed as just a ploy to get more money from the Government's 'deep pocket'. Contracting officials should make an honest attempt to differentiate between claims without merit and claims where they do not agree with the contracting officer. Legal assistance would be helpful in this determination.

4. Privacy

More privacy is an advantage in all the ADR techniques analyzed for use in this thesis. Disputes may be resolved more efficiently when the parties do not have to worry about every word being a matter of public record. In the public sector, agencies may not make decisions on contract disputes completely off the record. They must, at a minimum, document the rationale for the decision as well as the decision itself.

However, the ADR techniques in question do not require minutes like the courts. Therefore, if more privacy is desirable, ADR should be considered.

5. Lowered Costs

One of the primary reasons for the growing popularity of ADR is the perception that it lowers costs in relation to the courts and boards. If lower costs are desirable, all

other things being equal, contracting officials should examine the use of ADR.

The Corps of Engineers developed a simple formula to assess cost risk. The formula is to use ADR when $V_T - V_{ADR} < L + i$, where V_T is the expected value of a traditional settlement, V_{ADR} is the expected value of an ADR settlement, L is the cost of litigation expenses and i is the cost of interest. [59:61] Other agencies may wish to use different methods, but the basic principle is the same. Most of the literature focuses on the direct cost savings of each ADR method over the most common traditional method. This is clearly the simplest method to use based on such things as standard court costs per day, lawyer hours and administrative costs including salaries for the length of the trial.

6. Outcome in Court is Considered Risky

In some cases, the Government may have a good case which is not a guaranteed case. Simultaneously, the case may risk setting precedent or involve large sums of money. If the Government does not want to risk the courts, then ADR may be appropriate.

C. CRITERIA FOR CHOOSING AN ADR METHOD

The following criteria apply to choosing specific ADR methods. Some of the criteria apply to one specific method, almost to the exclusion of all others. More commonly, other

criteria apply to several methods or a group of methods on the ADR continuum.

1. Complex Issues

Complex issues are those which involve highly technical matters of fact or law. The issues become even more complex when they are interrelated. Certain ADR processes which involve participants who are able to grasp the issues are better for these types of cases. Negotiation based procedures are recommended for this. Technical experts in procedures such as fact-finding are occasionally recommended when the case is based on facts.

2. Multiple Parties Involved

Multiple party issues involve a number of players, often with different agendas. In certain claims, this can include subcontractor issues brought up by the prime. There are differences of opinion on whether all negotiation type methods are best for handling multiple parties. Facilitation is one method that is clearly recommended.

3. Continuing Relationship Between the Parties

The term 'continuing relationships' means a case where the players are locked into a long term arrangement because of a lengthy contract. It also applies to defense contractors who do a high percentage of Government business, and are constantly working on one or more Government contracts. Certain ADR processes, especially those where the

parties work out the situation by assisted or unassisted negotiation, help the long term relationships. That is because the parties will deal with each other in procedures dedicated to developing mutually satisfactory solutions and building trust, as well as solving the immediate claim issues.

4. Need for Timely Resolution

The need for a fast resolution is important in many cases, such as those which involve high amounts of interest from the Government, or when the financial survival of the firm depends on it. Certain forms of ADR are faster than other methods by nature. First, if the process is easily scheduled, the dispute process is initiated quickly. For example, the small claims procedures must be scheduled based on the availability of ASBCA judges while the time to use a neutral fact-finder is limited only by the internal selection process. Secondly, and more importantly, certain processes are by their nature faster than others. Mediation is a process which explores the different facets of the problem, often with confidential meetings with the parties. It can be a very time intensive process, although this is not always the case, especially in small cases with simple issues. A non-binding arbitration process on the other hand may be structured by the parties to be extremely time efficient.

5. Need for Control of the Process

Management is often much more satisfied with processes which are determined by the parties than with a formal and inflexible procedure. If the case has a history of unsatisfactory resolution using formal third party decisions, (such as the courts), ADR techniques providing control may be more suitable. Cases where the parties determine they need more control simply because of the personalities or previous experiences are also appropriate.

Flexibility is an attribute which is inherent in controlling a process. When management controls the process, to an extent they have some flexibility to make process changes to break a stalemate or impasse, or to improve relationships between parties. For example, both parties agree on the time limits for negotiations during a mini-trial. However, both parties may allow an extension if they see a compelling need.

6. Technical Expertise is Needed

Cases often hinge on a dispute between the technical experts of both parties. Often, the parties disagree in good faith about the interpretation of a contract clause, the amount of entitlement for a change or the technical meaning of an agreed upon task or standard. The expertise needed may be factually or legally based. In such cases, the recommendation or report of an expert recognized and respected

by both parties may break the impasse by showing how a case appears to someone who has no vested interests.

One major strength of using a skilled neutral is the ability to choose experts in a very narrow technical category. Another major benefit is the ability to use an expert familiar with the cultural norms of an industry, which is something few judges understand or consider in rendering an opinion. Expert procedures include the substantive and decision making categories in the ADR continuum.

7. Parties want a Final Third Party Decision

Certain cases require a final decision by a neutral. Although only the ASBCA's small claims procedure allows a binding decision by a neutral, several procedures call for a final definitive opinion by a neutral. These opinions theoretically have credibility because they provide a reasonably accurate picture of how a litigant would fare in the court. This characteristic is found in cases which need early settlement because of internal or external agency pressure to finish the case, or in cases where both parties are totally unable to come to a mutual decision, but still wish to avoid the courts.

8. Control of Outcome is Desirable

Some disputes are resolved more effectively when the parties make the final decision rather than relying on a third party to make the decision or render a final opinion. Most

of the allowable ADR processes let disputing parties make the final decision, but some rely heavily on a third party opinion. Cases which require the solution be crafted by the parties, rather than just given to the parties need to use the negotiation based processes, such as facilitation or mini-trials.

9. Case is Based Solely on Fact

Certain cases are based solely on a dispute about the facts. Many cases in DoD have this characteristic. For example, many times the dispute is not whether the contractor is entitled to payment, but how much the entitlement should be. Other disputes center on the meaning of specific technical terms in the contract or different interpretations of data. Often, all other things being equal, the case is best suited for substantive or decision making ADR techniques which use technical experts.

10. Case is Based Solely on Legal Issues

This characteristic is similar to those based solely on fact. Certain cases in DoD hinge on the interpretation of the law, such as differences on the meaning of precedent. If the case lends itself to ADR, the opinion of a neutral legal expert is helpful, such as a settlement judge or an arbitrator trained in the law.

11. Case is Based on Mixed Fact and Law

Cases such as these center on a mixture of legal and factual interpretation problems. These cases require ADR procedures which provide expert neutrals and /or participants skilled in determining both fact and law. Mini-trials are well suited to this type of case.

12. Integrative Approach is Needed

Certain cases revolve around more than just the face issues. Many claims appear to be a dispute over a simple fact or point of law, but are really disputes based on unspoken hidden interests or values of the parties. Resolution of the spoken issues will solve the claim but not the problem, which may become a recurring problem throughout the life of the contract. However, resolution of the hidden interests or value conflicts will often solve the problem permanently.

Negotiation based ADR procedures have the potential to solve these types of disputes more effectively than the procedures which key in on issues only. Once the determination has been made that the claim involves hidden agendas which have some validity, ADR procedures such as negotiation, mediation and facilitation should be examined.

13. Witness Credibility

Certain cases hinge on establishing the credibility of witnesses. If this is an important attribute of the case,

the literature suggests strongly that the mini-trial not be used, since it does not allow effective cross examination.

14. Unequal Power

In certain cases, the parties have unequal resources to apply to an ADR procedure. As examples, the parties may be unequal in funding, economic leverage or expertise. In these cases, ADR procedures which require the parties to work out a solution may favor the more powerful party. More formal processes may be more appropriate in these cases.

15. Value of the Claim is High

The cost of certain processes is high compared to the cost of others. If the potential settlement involves a large amount of money, certain ADR procedures are cost effective, because they would be very expensive to litigate. For example, the mini-trial is very effective, but is much more costly than non-binding arbitration. Agency definitions of 'high value' range from \$250,000 to \$1,000,000 as cutoffs.

16. Value of the Claim is Low

Alternately, the low cost of some claims requires a low cost, routine procedure which does not tie up a great deal of senior time, or agency expertise and funds. These types of disputes are better solved by more formal third party assistance such as non-binding arbitration or small claims procedures.

17. High Volume of Similar or Routine issues

Certain contracts or contract types may have similar issues come up again and again. These issues are basically the same, with slight variations. These cases may be better suited to standard routine processes such as the small claims procedure or non-binding arbitration.

18. Issues are Unclear

Some contract disputes involve issues which are not clear to the disputants. Often, the adversarial process creates a number of side issues which obscure the real heart of the dispute. Certain ADR processes force the parties to concentrate on what is important, and help discard the superfluous issues. One way is to limit preparation time and presentation time, forcing the parties to concentrate on only key issues, such as mini-trials. Another way is to use processes that give the parties an opinion on the validity of the issues, forcing the parties to reevaluate what is truly important.

19. Parties are Hostile

In many disputes, hostility is so deep that it may seem the only way to proceed is to go to court. This hostility is often complicated by a lack of trust, and misunderstandings about the other party. However, if these cases are adjudicated, the parties will continue to have an adversarial relationship.

20. Polarized Positions

Sometimes, the disputing parties are deeply entrenched in their positions. They may be talking, and may even still be friendly, but each side is convinced they are correct. In such cases, ADR techniques which allow a neutral to provide an independent opinion or force the parties to reexamine their positions are helpful.

21. Need to Use Confidential Information Without Disclosure

In some cases, it would be valuable to provide a third party neutral with information which would not be directly shared with the disputing party. This is particularly relevant when interest or value based issues are part of the dispute. In mediation, and mediation based processes, the mediator can receive confidential information to assist her in understanding the position of a party.

22. Dispute is in Early Stages

One of the main reasons for using ADR is the potential cost savings over formal adjudication. Some ADR processes are much more cost effective in the early stages because trial preparation costs are still low. ADR techniques developed to provide one last shot at settlement before trial are not appropriate for use in the early stages of a dispute.

23. Parties have Reached a Communication Impasse

For any number of reasons, disputing parties may ultimately reach a point where they cannot communicate. At that point, without third party assistance, the dispute will go to court. Alternately, negotiations may resume with third party intervention such as mediation or advisory mediation.

24. Parties Cannot Select a Process

This criterion is when the parties have areas they can agree on but do not know how to start negotiating or what process to use. In these cases, only process assistance is needed, not substantive assistance. This criterion basically lends itself to facilitation and mediation.

25. Parties Have Known Areas of Agreement

If the disputing parties have areas they basically agree on, the dispute has potential for negotiation based procedures. This goes back to the integrative method of problem solving, where the thrust of the negotiations is to solve a problem and come up with a mutually satisfactory answer.

26. Parties Require Procedural and Advisory Assistance

A case which requires procedural assistance in the form of mediation may also potentially require an advisory opinion. This is appropriate in cases where the parties may have problems reaching a solution, and want an additional

procedure as a safety net. The additional advisory procedure will provide the parties with a reason to maintain negotiations, without resorting to the courts if the mediation breaks down. ADR methods like advisory mediation or settlement conferences, which start as mediation but can lead to advice may be used in such cases.

27. Lack of Negotiation Expertise

If one or both parties lack the skill to negotiate effectively, unassisted negotiations are probably inappropriate. In these cases, some form of procedural or substantive assistance may help the parties reach a satisfactory agreement.

D. MATCHING CRITERIA WITH METHODS

This section will match the specific criteria to appropriate ADR methods using tables. Table 1 shows a matrix of ADR techniques matched to criteria. This table represents only the initial compilation of data. References showing the sources of the data are provided in Appendix B.

Table 1 matches criteria with methods. The ADR methods are presented in order as cooperative methods, procedural methods, substantive methods and non-binding assistance. This is the order presented in the continuum given in chapter III. Each positive sign means that one literature source recommended the method be used if the criteria was present.

Each negative sign means that one literature source recommended the method not be used if the criterion was present. Blanks show no data were found. In some cases, the literature was divided between a positive or negative match. These data are presented in Table 1.

Table 1 shows certain methods have a great many matches, and other methods have almost no matches. This could mislead the reader to assume that one method is heavily preferred over another. Although certain criteria probably do favor some processes more than others, this cannot be determined from the table.

Weighting the criteria and ranking its impact on process selection was beyond the scope of this thesis, for the following reason. The data were collected by reviewing available literature in the field. Certain ADR methods have been around a long time, and consequently are written about extensively. Other methods are relatively new and have not been as well documented. For example, mediation and negotiation are established methods, while dispute resolution panels were only recently developed as a process. Therefore, the literature will show many more matches for mediation than the dispute panels on a criterion which favors both.

TABLE 1. CRITERIA

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
Precedent/Public Norm	(1)-	(1)-	(2)-	(5)-	(1)-	(2)-	(1)-	(2)-	(7)-	(1)-
Willing to use ADR	(6)+	(2)+	(4)+	(4)+	(2)+	(2)+	(2)+	(2)+	(2)+	(2)+
Claims w/out Merit	(1)-	(1)-	(1)-	(1)-	(1)-	(1)-	(1)-	(1)-	(1)-	(1)-
Privacy Need	(3)+	(1)+	(8)+	(6)+	(1)+	(1)+	(3)+	(1)+	(7)+	(1)+
Lowered Costs	(2)+	(2)+	(7)+	(7)+	(2)+	(5)+	(3)+	(3)+	(8)+	(3)+
Court Outcome Risky	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+
Complex Issues	(1)+(1)-	(1)+	(3)+	(8)+			(1)+		(1)+(1)-	
Multiple Parties	(1)-	(2)+	(5)+(1)-	(3)+(1)-			(1)+		(1)+(1)-	(2)-
Continual Relationship	(3)+	(1)+	(6)+	(4)+	(1)+	(1)+				
Need for Timeliness	(4)+	(1)-	(4)-(2)+	(3)+	(3)+	(2)+		(1)+	(9)+	(5)+
Need to Control Process	(5)+	(1)+	(4)+	(5)+		(1)+		(1)+	(3)+(1)-	
Technical Expertise			(1)-	(2)+	(3)+		(6)+	(1)+	(10)+	
Need Neutral Final Dec.									(3)+	(2)+
Need to Control Outcome	(2)+	(1)+	(4)+	(2)+		(1)+		(1)+	(2)-	(1)-
Fact Based			(1)+	(5)+	(3)+		(6)+		(2)+	(1)+
Legally Based			(1)-	(4)-	(1)-			(1)+		
Mixed Law & Fact Based				(5)+						
Need Integrative Approach	(9)+	(1)+	(9)+	(5)+	(1)-	(7)+	(1)-	(2)+		
Question Witness Credibility			(1)-	(5)-						
Unequal Power	(4)-	(1)-	(4)-	(2)-					(1)+	(1)+
Claim Value High				(6)+						
Claim Value Low			(2)+	(3)-	(1)+		(2)+		(6)+	(3)+
Routine High Volume					(1)+				(4)+	(1)+
Unclear Issues		(1)+		(1)+						
Parties Hostile	(2)-	(1)-	(4)+(1)-	(2)+			(1)+		(2)+	
Positions Polarized	(1)-	(3)-	(8)+	(7)+	(1)+		(2)+	(4)+	(3)+	(1)+
Confidential Information		(1)+	(4)+							
Early Stage of Dispute	(1)+			(6)+	(3)+					
Communication Impasse	(3)-	(1)+	(3)+	(3)+		(1)+				
Cannot Select Process		(3)+	(2)+							
Known Agreement Areas	(2)+		(2)+							
Need Procedural and Substantive Assistance						(3)+		(3)+		
Lack Negotiating Expertise	(2)-	(1)+	(2)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+	(1)+

The number shown in each column represents the same number of plus or minus signs.

The next step in the analysis was to take the data and eliminate the number of (+) and (-) signs in each block. Since the number of matches did not rank order choice of method, as explained above, simplifying the data provided easier analysis of the tables.

Each block was given one character. These were:

1. A (+) meant the criterion favored the method.
2. A (-) meant the criterion did not favor the method. Its presence signaled the method should not be selected.
3. A (D) meant there was dissent in the literature concerning the presence of the criterion. Some literature stated the criterion showed the method should be selected and some literature showed non-selection was favored.
4. An (N) meant there was no data found that linked the criterion with the method.

The simplified data are presented in Table 2.

The next step was to split the first six criteria from the rest of the criteria. These were the need for precedent, the parties' willingness to use ADR, meritless claims, the need for privacy, lowered costs using ADR and an analysis that a court outcome is too risky.

They were separated from the data since they assist in choosing ADR versus traditional adjudication methods, rather than choosing a specific ADR method. These criteria occurred in the literature. However, they were presented as characteristics which affected ADR selection overall, rather

TABLE 2. SIMPLIFIED CRITERIA

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
Precedent/Public Norm	-	-	-	-	-	-	-	-	-	-
Willing to use ADR	+	+	+	+	+	+	+	+	+	+
Claims w/out Merit	-	-	-	-	-	-	-	-	-	-
Privacy Need	+	+	+	+	+	+	+	+	+	+
Lowered Costs	+	+	+	+	+	+	+	+	+	+
Court Outcome Risky	+	+	+	+	+	+	+	+	+	+
Complex Issues	D	+	+	+	N	N	+	N	D	n
Multiple Parties	-	+	D	D	N	N	+	N	D	-
Continual Relationship	+	+	+	+	+	+	N	N	N	N
Need for Timeliness	+	-	D	+	+	+	N	+	+	+
Need to Control Process	+	+	+	+	N	+	N	+	D	N
Technical Expertise	N	N	-	+	+	N	+	+	+	N
Need Neutral Final Dec.	N	N	N	N	N	N	N	N	+	+
Need to Control Outcome	+	+	+	+	N	+	N	+	-	-
Fact Based	N	N	+	+	+	N	+	N	+	+
Legally Based	N	N	-	-	-	N	N	+	N	N
Mixed Law & Fact Based	N	N	N	+	N	N	N	N	N	N
Need Integrative Approach	+	+	+	+	-	+	-	+	N	N
Question Witness Credibility	N	N	-	-	N	N	N	N	N	N
Unequal Power	-	-	-	-	N	N	N	N	+	+
Claim Value High	N	N	N	+	N	N	N	N	N	N
Claim Value Low	N	N	+	-	+	N	+	N	+	+
Routine High Volume	N	N	N	N	+	N	N	N	+	+
Unclear Issues	N	+	N	+	N	N	N	N	N	N
Parties Hostile	-	-	D	+	N	N	+	N	+	N
Positions Polarized	-	-	+	+	+	N	+	+	+	+
Confidential Information	N	+	+	N	N	N	N	N	N	N
Early Stage of Dispute	+	N	N	+	+	N	N	N	N	N
Communication Impasse	-	+	+	+	N	+	N	N	N	N
Cannot Select Process	N	+	+	N	N	N	N	N	N	N
Known Agreement Areas	+	N	+	N	N	N	N	N	N	N
Need Procedural and Substantive Assistance	N	N	N	N	N	+	N	+	N	N
Lack Negotiating Expertise	-	+	+	+	+	+	+	+	+	+

than specific method selection. These data are shown separately in Figure 2. These criteria do not occur in any subsequent tables.

The next step was to divide the data into positive, negative and undecided tables. In each table, only the criteria with a positive, negative or undecided match was listed. This allows the contracting officer to see the different types of matches at a glance. Table 3 lists positive criteria, Table 4 lists negative criteria, and Table 5 lists criteria which have positive and negative matches in the same block.

The criteria for each table were listed from those which occurred most frequently to those which occurred least frequently. For example, if a criterion matched seven methods positively, it was listed before one which matched one method positively.

Additionally, the different methods were reordered slightly. Specifically, the substantive processes were ordered differently to show the more integrative processes such as advisory mediation before the less integrative processes like factfinding. This regrouping helped show certain patterns in the data more clearly. These data are presented in Table 3, 4 and 5.

CHARACTERISTIC	USE ADR
Need Precedent/Public Norm	No
Willingness to Use ADR	Yes
Claim has no Merit	No
Need for Privacy	Yes
ADR will Lower Costs	Yes
Outcome in Court Risky	Yes

Figure 2. Characteristics to Assist in Choosing ADR or Adjudication

TABLE 3. CRITERIA USED TO SELECT ARD METHODS

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
LACK NEGOTIATING EXPERTISE		+	+	+	+	+	+	+	+	+
NEED FOR TIMELINESS	+			+	+	+	+		+	+
POLARIZED POSITIONS			+	+		+	+	+	+	+
CONTROL OF OUTCOME	+	+	+	+	+	+				
CONTROL OF PROCESS	+	+	+	+	+	+				
CONTINUAL RELATIONSHIP	+	+	+	+	+		+			
INTEGRATIVE APPROACH	+	+	+	+	+	+				
FACT BASED			+	+			+	+	+	+
TECHNICAL EXPERTISE				+		+	+	+	+	
CLAIM VALUE LOW			+				+	+	+	+
COMPLEX ISSUES		+	+	+				+		
COMMUNICATION IMPASS	+	+	+				+			
ROUTINE HIGH VOLUME							+		+	+
PARTIES HOSTILE				+				+	+	
EARLY STAGE DISPUTE	+			+			+			
MULTIPLE PARTIES		+						+		
NEUTRAL FINAL DECISION									+	+
UNEQUAL POWER									+	+
UNCLEAR ISSUES		+		+						
CONFIDENTIAL INFORMATION		+	+							
CANNOT SELECT PROCESS		+	+							
KNOWN AGREEMENT AREAS	+		+							
NEED PROC/SUB ASSIST.					+	+				
LEGALLY BASED						+				
MIXED LAW AND FACT				+						
CLAIM VALUE HIGH				+						

TABLE 4. CRITERIA USED TO DELETE ADR METHODS

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
UNEQUAL POWER	-	-	-	-	-	-	-	-	-	-
LEGALLY BASED	-	-	-	-	-	-	-	-	-	-
PARTIES HOSTILE	-	-	-	-	-	-	-	-	-	-
POSITIONS POLARIZED	-	-	-	-	-	-	-	-	-	-
MULTIPLE PARTIES	-	-	-	-	-	-	-	-	-	-
CONTROL OF OUTCOME	-	-	-	-	-	-	-	-	-	-
INTEGRATIVE APPROACH	-	-	-	-	-	-	-	-	-	-
WITNESS CREDIBILITY	-	-	-	-	-	-	-	-	-	-
TECHNICAL EXPERTISE	-	-	-	-	-	-	-	-	-	-
CLAIM VALUE LOW	-	-	-	-	-	-	-	-	-	-
COMMUNICATION IMPASSE	-	-	-	-	-	-	-	-	-	-
LACK OF NEGOTIATING EXPERTISE	-	-	-	-	-	-	-	-	-	-
NEED FOR TIMELINESS	-	-	-	-	-	-	-	-	-	-

TABLE 5. DIVIDED CRITERIA

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
COMPLEX ISSUES	D								D	
MULTIPLE PARTIES			D	D					D	
NEED FOR TIMELINESS			D							
CONTROL OF PROCESS									D	
PARTIES HOSTILE			D							

The 10 ADR procedures could be grouped into categories based on certain criteria. These categories are listed below:

1. Integrative procedures - These were the negotiation/mediation based procedures which had the potential for integrative problem solving. They included negotiation, facilitation, mediation, mini-trials, advisory mediation and the settlement conference.
2. Unassisted procedures - There was only one procedure which did not use a third party. This was negotiation. (Occasionally the mini-trial may be conducted without assistance, but this is less common than the assisted mini-trial.)
3. Procedural procedures - These were the procedures where the neutral helped mostly with process. They were mediation and facilitation.
4. Substantive procedures - These were the procedures where the neutral helped with the legal and or factual issues of substance. They were the mini-trial, advisory mediation, the settlement conference, dispute resolution boards, and fact-finding.
5. Advisory procedures - These were procedures where the neutral delivers a decision. The decision is not crafted by the parties. The one non-binding process in this category is non-binding arbitration, and the one binding process is the summary ASBCA process.
6. Procedural/substantive assistance procedures - These were the substantive procedures which were primarily mediation based, but the parties have the ability to receive a specific opinion from the neutral concerning their case. They were advisory mediation and the settlement conferences.
7. Factual procedures - These were the substantive procedures which rely on a factual report provided by a chosen expert(s). They were the dispute resolution panel and fact-finding.

In summary, the ADR methods may be conceptually categorized several ways. First, they can be broadly divided into integrative and non-integrative procedures. The groups may be further divided in the continuum categories referenced in Chapter III, including cooperative decision making, procedural methods, substantive methods, and advisory non-binding and binding methods. Finally, the substantive category may be broken into the mini-trial as a stand alone process, procedural/substantive methods and factually based methods.

The criteria showed some rough trends based on Table 3. These trends were developed by visually screening the data tables. There were no general trends for the negative tables. The positive table trends are listed below:

1. Four criteria tended to support the choice of the negotiation/mediation based techniques. These were the need to control outcome, the need for an integrated approach, the need to control the process and the existence of a continuing relationship. This does not assume that all dispute negotiations will be integrative. It merely shows that if the need to problem solve and come up with mutually acceptable solutions is inherent in the conflict, methods such as negotiation, mediation and mini-trials are better suited to the dispute.
2. There were trends for factually based disputes. Understandably, those processes which were geared to factual research or advice, predominantly dispute boards and fact-finding, matched the fact-based, technically oriented disputes.
3. Certain criteria showed a preference for selecting the more formal, factual procedures over the integrative procedures. These included fact-based

claims, low value claims, those which were routine or high volume, those requiring a final decision and those where the parties had a power inequality.

4. Another group of criteria tended towards selection of negotiation and the procedural methods, facilitation and mediation. The procedural methods showed a positive match with the criteria of the inability to select a process and the need to exchange confidential information. Negotiation and mediation were favored if there were known areas of agreement.
5. One characteristic set two procedures apart. This was the need for both procedural and substantive advice, which attempted to blend the advantages of mediation with advisory opinions. This characteristic positively matched selection of both the settlement conferences (for legal advice) and advisory mediation.
6. The mini-trial had the highest number of favorable criteria, possibly because it combines the elements of mediation, negotiation and substantive assistance. In fact, it is the only procedure recommended for high value, mixed law and fact disputes.

E. CHAPTER SUMMARY

This chapter presented 33 case criteria. They were divided into criteria which are generic to all ADR selections over the traditional methods and those which match specific ADR methods.

The criteria were placed into a general table which matched them to 10 ADR methods. The data were then reworked to make it meaningful. Several tables were generated to show positive, negative and dual matches of criteria with method.

Then the data were evaluated to identify general trends between the methods and the criteria.

V. CONCLUSIONS AND RECOMMENDATIONS

A. CONCLUSIONS ON RESEARCH QUESTIONS

The following are the conclusions on the subsidiary research questions.

1. What are the recognized ADR methods and their characteristics? The answer is provided in Figure 3.
2. What are the key criteria of disputes that must be considered when making the choice on an appropriate ADR methods? The key criteria are:
 - a. The case requires the setting of precedent or public standards.
 - b. The contractor and the Government are willing to use ADR.
 - c. The claim is without merit.
 - d. There is a need for privacy.
 - e. The costs are lowered by using an ADR method.
 - f. The projected court outcome is risky.
 - g. The case is complex.
 - h. There are more than two parties involved.
 - i. There is a continual relationship.
 - j. There is a need for timely resolution.
 - k. The parties want to control the process.
 - l. There is a need for technical expertise.
 - m. There is a need for an expert final decision.
 - n. The parties want to control the outcome.

- o. The dispute is based on fact.
- p. The dispute is based on legal issues.
- q. The dispute is based on mixed fact and legal issues.
- r. The parties need an integrative approach.
- s. There is a problem with witness credibility.
- t. The parties are unequal in power.
- u. The claim value is high.
- v. The claim value is low.
- w. The contract has a number of routine, high volume claims.
- x. The issues in dispute are unclear.
- y. The parties are hostile.
- z. Positions are polarized.
- aa. The parties need to use confidential information without exchanging it.
- bb. The dispute is in the early stages.
- cc. There is a communication breakdown.
- dd. The parties are willing to negotiate but can't decide on the process.
- ee. There are known areas of agreement.
- ff. The parties need assistance in communicating as well as substantive assistance.
- gg. There is a lack of negotiation expertise.

ADR METHODS AND THEIR CHARACTERISTICS

METHOD	CHARACTERISTICS
1. Negotiation	<ul style="list-style-type: none">- Voluntary- Non-binding- Unassisted discussion- Potential for integrative solutions- Flexible- Most common form ADR
2. Facilitation	<ul style="list-style-type: none">- Voluntary- Non-binding- Use of neutral for process assistance- No opinions or advice given- Negotiation based
3. Mediation	<ul style="list-style-type: none">- Voluntary- Non-binding- Use of neutral for process- Use of neutral for alternative options- Emphasis on acceptable solutions
4. Mini-trials	<ul style="list-style-type: none">- Voluntary- Non-binding- Uses evidence hearing then negotiation- Senior executive involvement- May require discovery- Time constrained by agreement
5. Dispute resolution panel	<ul style="list-style-type: none">- Voluntary- Non-binding- Panel of experts hear case- Panel used at beginning of dispute
6. Advisory mediation	<ul style="list-style-type: none">- Voluntary- Non-binding- Attempt to use mediation first- Mediator gives opinion on request
7. Fact-finding	<ul style="list-style-type: none">- Voluntary- Non-binding- Use of expert neutral- Provides expert report or opinion- Emphasis on technical expertise

8. Settlement conference	<ul style="list-style-type: none"> - Voluntary - Non-binding - Use of judge as mediator and advisor - Can get legal advice and reality check
9. Non-binding arbitration	<ul style="list-style-type: none"> - Voluntary - Non-binding - Use of expert to provide opinion - Formal presentation of cases - Limited parties interaction
10. Summary binding ASBCA procedures	<ul style="list-style-type: none"> - Voluntary - Binding - Use of abbreviated ASBCA hearing - Judge decides with no appeal
11. Binding arbitration	<ul style="list-style-type: none"> - Voluntary - Binding - Illegal in DoD - Formal hearing w/ binding decision
12. Mediation-Arbitration	<ul style="list-style-type: none"> - Voluntary - Binding - Illegal in DoD - Parties initially mediate - Arbitrator decides case if mediation breaks down - May use same or different persons for the mediation and arbitration
13. Private judging	<ul style="list-style-type: none"> - Voluntary - Binding - Illegal in DoD - Referred to private neutral by court rule - Case tried in front of neutral
14. Summary jury trial	<ul style="list-style-type: none"> - Voluntary - Non-binding - Not applicable to DoD cases - Mock trial held w/ non-binding jury recommendation
15. Ombudsman	<ul style="list-style-type: none"> - Voluntary - Appointed investigator for complaints - Not applicable to contract cases

16. Regulatory negotiation	<ul style="list-style-type: none"> - Voluntary - Parties and agencies negotiate on rulemaking - Not applicable to contract cases
17. Neighborhood justice centers	<ul style="list-style-type: none"> - Voluntary or mandatory - Used to solve local neighborhood cases using a variety of methods. - Not applicable to DoD cases
18. Cooperative decision making	<ul style="list-style-type: none"> - Voluntary - Prior to disputes, decide on how to settle disputes - Not applicable to this thesis

Figure 3. ADR Methods and Their Characteristics

3. What are the best methods to use given specific dispute criteria. First, the usable ADR methods are:

- a. Negotiation
- b. Facilitation
- c. Mediation
- d. Mini-trials
- e. Advisory mediation
- f. Settlement conferences
- g. Fact-finding
- h. Dispute resolution panel
- i. Non-binding arbitration
- j. Summary ASBCA procedures

The positive and negative criteria for each specific method are as follows:

CRITERIA FOR CHOOSING SPECIFIC ADR METHODS

ADR METHOD	CRITERIA
1. Negotiation	Positive - outcome control Positive - timeliness Positive - integrated approach Positive - process control Positive - continuing relationship Positive - early stages of dispute Positive - known areas of agreement Negative - unequal power Negative - communication impasse Negative - hostility Negative - lack negotiating expertise Negative - polarized positions Negative - multiple parties

2. Facilitation	Positive - outcome control Positive - integrated approach Positive - process control Positive - continuing relationship Positive - complex issues Positive - multiple parties Positive - help in selection process Positive - confidential information Positive - lack of negotiation expertise Positive - communication impasse Positive - unclear issues Negative - unequal power Negative - hostility Negative - polarized positions Negative - timeliness
3. Mediation	Positive - outcome control Positive - polarized positions Positive - integrated approach Positive - process control Positive - fact based Positive - continuing relationship Positive - low value Positive - complex issues Positive - help in selection process Positive - confidential information Positive - known agreement Positive - lack of negotiation expertise Positive - communication impasse Negative - unequal power Negative - legally based Negative - witness credibility Negative - technical expertise
4. Mini-trials	Positive - outcome control Positive - timeliness Positive - polarized positions Positive - integrated approach Positive - process control Positive - fact based Positive - technical expertise Positive - continuing relationship Positive - complex issues Positive - early stages dispute Positive - high value Positive - mixed law and fact Positive - lack of negotiation expertise Positive - communication impasse Positive - parties hostile

	Positive - unclear issues Negative - legally based Negative - low value Negative - witness credibility Negative - unequal power
5. Advisory mediation	Positive - outcome control Positive - timeliness Positive - integrated approach Positive - process control Positive - continuing relationship Positive - proc/subst. assistance Positive - lack of negotiation expertise Positive - communication impasse
6. Settlement conference	Positive - outcome control Positive - timeliness Positive - polarized positions Positive - integrated approach Positive - process control Positive - technical expertise Positive - proc/subst. assistance Positive - legally based Positive - lack of negotiation expertise
7. Dispute resolution panel	Positive - timeliness Positive - polarized positions Positive - fact based Positive - technical expertise Positive - continuing relationship Positive - early stages of dispute Positive - routine, high volume Positive - lack of negotiation expertise Positive - claim value low Negative - legally based Negative - integrated approach
8. Fact-finding	Positive - polarized positions Positive - fact based Positive - technical expertise Positive - low value Positive - complex issues Positive - multiple issues Positive - lack of negotiation expertise Positive - parties hostile Negative - integrative approach
9. Non-binding arbitration	Positive - timeliness Positive - polarized positions Positive - technical expertise

	Positive - fact based
	Positive - low value
	Positive - neutral final decision
	Positive - routine, high volume
	Positive - lack of negotiation expertise
	Positive - parties hostile
	Positive - unequal power
	Negative - outcome control
<hr/>	
10. Summary ASBCA procedures	Positive - timeliness
	Positive - polarized positions
	Positive - fact based
	Positive - low value
	Positive - neutral final decision
	Positive - routine, high volume
	Positive - lack of negotiation expertise
	Positive - unequal power
	Negative - outcome control
	Negative - multiple parties

Figure 4. Criteria for Choosing Specific ADR Methods

B. RECOMMENDED GUIDE FOR CONTRACTING OFFICERS

The following steps will assist a contracting official in choosing the best ADR method for a given case.

1. Evaluate the situation concerning the particular claim in question. The following questions may help:
 - a. What are the organizational policies and procedures you must work with when resolving claims?
 - b. How experienced are you and your personnel in settling claims out of court?
 - c. What do you want to accomplish with the claim settlement?
 - d. How good is your relationship with the contractor?
 - e. What are the environmental factors which impact on the claim settlement? These may include such items as fund availability, whether the claim impacts on other contracts or any other factor which must be realistically considered by the contracting officer.
2. List the criteria which apply to the case from those developed in this thesis. These criteria are listed on page 125 of this chapter. The evaluation of the situation, accomplished in step 1, should be used to help establish the criteria. For example, if the contracting officer has little time to spend on the dispute, he should include the need for timely resolution as one of his criterion.
3. Using the six criteria given in Figure 2 (page 118), decide whether the case should be adjudicated traditionally or ADR should be used. These criteria are:

- a. The case requires precedent standards be set.
- b. The parties are willing to use ADR.
- c. The claim is without merit.
- d. There is a need for privacy.
- e. The costs are lowered by using an ADR method.
- f. The projected court outcome is risky.

If it is decided to go a traditional route, the analysis is basically over.

- 4. If the decision is made to use ADR, assign a relative priority to the case criteria based on your organization's policies and realistic environmental factors. This makes it easier to choose or delete certain methods.

For example, the contracting officer has a claim from a small business which has been providing a replacement spare. The contractor and the contracting officer disagree on the technical meaning of a certain contractual requirement, and the contractor has claimed he will need \$20,000 to adjust the contract to the Government's satisfaction. The Government's technical people and the contractor are becoming openly hostile with one another, since this is the 5th claim in as many months, and the contract has 5 months left to run. The contractor has stated he does not trust the Government.

The contracting officer decides the criteria which apply to the case include: the need for technical expertise, the fact there is a continuing relationship, the presence of

hostile parties, the low value of the claim and the fact that both he and the contractor want control of the outcome. The contracting officer decides that the most important issue is to improve relationships with the contractor, to prevent future claims. Therefore, the criterion of a continuing relationship is ranked higher than the other criteria, and will be weighted more heavily in method selection. The second most important criterion is the low value of the claim, because the contracting officer does have to account for how he spends his resources relative to what is accomplished.

5. Once you have the criteria rankings based on your case, use the tables to help select an appropriate ADR method. First, using Table 3 (page 119), select the ADR methods which are appropriate based on positive criteria. You may use the trends listed on pages 122-123 to help select groups of methods. However, specific methods must ultimately be chosen from the groups based on the data from the tables.

For example, the case above shows the negotiation/mediation based methods are recommended for outcome and process control, and continuing relationships, while the need for expertise and the low value claims are recommended for dispute resolution boards, fact-finding, non-binding arbitration and summary procedures. The presence of hostility, however, shows only mini-trials recommended on the chart.

6. The next step is to use Table 4 (page 120) to evaluate the remaining ADR methods to see which are inappropriate given certain criteria. The mini-trial is not recommended when the claim value is low. So in the example, the mini-trial is deleted. Non-binding arbitration and summary procedures are deleted, since they are not recommended when outcome control is required. Negotiation and facilitation are not favored when hostility is present.

7. Use Table 5 (page 120) to resolve additional questions about criteria and a preferred method. This table will show if certain experts believed it to be an appropriate or inappropriate method, even if there was not consensus in the field. For the example, the criterion of hostile parties was only recommended for the mini-trial. However, Table 5 shows that mediation may be appropriate according to some experts when the claimants are hostile.
8. Select the methods based on the table data and internal priorities. Keep in mind some of these processes are flexible, and may be adjusted to accommodate certain cases. Finishing the example, the contracting officer knows that the favored methods are now mediation, and to a lesser extent, fact-finding, and the dispute resolution board. He therefore decides to have the claim mediated, but discusses limiting the time with the contractor. He also recommends the use of a fact-finder to give a report on the technical interpretation of the requirement if the mediation becomes stalled. The report could be used for further mediation.

Using these steps, the contracting officer can narrow method selection down to one or two appropriate criteria. As a note, the contracting officer must apply some judgment, since this is a guide, not a formula.

C. RECOMMENDATIONS FOR ADDITIONAL RESEARCH

The following are three recommendations for additional research in ADR.

1. One concern expressed by the Navy is the reluctance of the defense contractor in using ADR techniques. Research is needed to decide if contractors are reluctant to use certain methods, why they have this reluctance and what procedures and modifications to the rules would help overcome the reluctance.

2. A second concern, expressed by the Navy, is how to provide incentives for the contracting officers to use ADR. Currently, ADR programs are top driven. Research is needed to find out how the field contracting officers feel about using ADR, and what needs to be done to encourage them to voluntarily use the program. For example, how could the reward structure reinforce using ADR.
3. The ADR field is potentially appropriate for the development of an expert system to assist in deciding which methods are best suited for a particular case. The research could potentially automate what this thesis did manually.

D. CHAPTER SUMMARY

This chapter provided the conclusions to the initial research questions. Then it recommended a guide for the contracting officer to use to make an appropriate choice of an ADR method. Finally, it provided recommendations on future research.

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APPENDIX B
REFERENCE DATA

CRITERIA	NEG	FAC	RED	MT	DRP	ADM	FF	SC	NBA	BAP
Precedent/ Public Norm	-23/677	-18/2	-23/677 -3/51	-50 -19/354 -63/1 -45/84 -47/20	-18/2	-18/2 -3/164	-18/2	-33/505 -18/2	-11/260 -11/191 -53/42 -50 -20/91 -45/95 -18/2	-18/2
Willing to use ADR	45/34 59 50 45/44 52/80 3/110	45/34 59	45/34 59 45/78 52/80	45/34 59 43/38 24/354	45/34 59	45/34 59	45/34 59	45/34 59	45/34 59	45/34 59
Claims w/out Merit	-65	-65	-65	-65	-65	-65	-65	-65	-65	-65
Privacy Need	45/40 53/42 48/9	45/40	45/40 53/42 48/9 22/268 42/31 11/119 11/131 11/189	45/40 48/10 58/6 50 43/15 11/274	45/40	45/40	45/40 48/10 18/5	45/40	45/40 53/13 53/42 48/9 50 11/254 58/3	45/40
Lowered Costs	45/40 18/1	45/40 18/1	45/40 18/1 53/16 19/438 49/8 42/31 11/192	45/40 18/1 36/11 49/18 45/84 42/13 11/276	45/40 18/1	45/40 18/1 11/167 11/256 3/158	45/40 18/1 49/8	45/40 18/1 1/179	45/40 18/1 53/13 49/4 11/226 11/189 11/233 3/53	45/40 18/1 11/171
Court Outcome Risky	59/62	59/62	59/62	59/62	59/62	59/62	59/62	59/62	59/62	59/62

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	MAP
Complex Issues	11/11	11/11	53/35	23/673	-		49/8		49/8	
	-7/133		49/8	11/11					-11/236	
			11/11	37/4						
				38/4						
				50						
Multiple Parties				43/38						
				26/592						
				49/8						
				59/65						
				52/78						
Continual Relationship	-7/93	45/79	59/77	-43/45			49/8		-50	-54/5
		59/77	53/35	26/592					49/8	-11/59
			49/8	49/8						
			45/95	59/65						
			52/78							
Need for Timeliness	1/36	45/71	53/77	43/39	47/26	11/257				
	11/10		22/264	30/21						
	3/110		45/78	42/17						
			42/31	11/276						
			18/7							
Need to Control Process	25/1425	-45/75	-53/14	63/1	42/36	11/256		11/79	53/34	17/34
	45/45		19/438	42/17	47/26	3/158			23/674	54/5
	13/81		-49/24	11/276	40/39				20/86	1/70
	3/110		42/31						42/34	11/11
			-13/122						18/5	11/171
Need to Control Process	5/34	7/152	53/34	43/46					35/19	
	9/55		49/25	63/1					59/62	
	1/59		11/124	43/5					5/53	
	11/7		36/1234	7/177						
	3/110			59/67						

CRITERIA	NEG	FAC	MED	MT	DRP	ADM	FF	SC	NBA	BAP
Technical Expertise			-22/268	21/9 45/32	47/26 59/77 45/86		48/10 18/5 40/35 59/77 45/87 49/29	45/89	53/13 48/9 38/3 22/268 50 59/65 49/22 47/30 40/32 11/189	
Need Neutral Final Dec.									53/34 48/9 22/264	48/8 47/34
Need to Control Outcome	11/7 3/110	45/71	53/14 36/1235 48/9 45/78	7/177 59/67		3/138		1/179	53/13 59/67	-1/166
Fact Based			49/8	26/592 43/2 49/8 35/22 59/65	42/36 47/26 35/22		45/87 18/5 40/35 11/283 35/18 49/8		49/8 59/65	54/5
Legally Based			-19/438	-26/590 -45/84 -49/20 -11/276	-42/36			45/89		
Mixed Law & Fact Based				11/275 43/39 26/592 42/13 45/84						

CRITERIA	MEG	FAC	MED	MT	DRP	ADN	FF	SC	NBA	BAP
Need Integrative Approach	53/34 48/9 45/96 52/80 51/29 1/36 9/42 11/59 1/218	45/71	54/34 1/218 11/98 11/133 48/9 23/682 36/1234 13/220 30/49	43/4 1/218 45/96 11/547 11/547 11/274	-45/96	1/170 1/218 3/158 45/96 1/166 1/218 11/257	-45/96	1/218 33/504		
Witness Credibility			-36/1234 -50 -43/45 -43/2 -45/89	-38/4 -50 -43/45 -43/2 -45/89						
Unequal Power	-45/44 -1/23 -11/11 -7/10	-11/11	-53/15 -45/78 -11/11 -11/113	-43/43 -11/11					11/11	11/11
Claim Value High			38/4 50 43/40 26/590 63/1 59/66	38/4 50 43/40 26/590 63/1 59/66						
Claim Value Low			44/10 11/124	-42/40 -47/20 -35/21	59/77		40/21 59/77		14/4 44/10 11/11 11/228 59/77 31	54/75 11/11 42/36
Routine High Volume					40/39				50 49/22 11/11 14/4	
Unclear Issues		45/71		23/673						

CRITERIA	NEG	FAC	MED	INT	DRP	ADM	FF	SC	NBA	BAP
Hostility between Parties	-45/45 -11/272	-45/30	48/5 49/8 -45/78 13/108 35/21	49/8 11/272			49/8		22/269 49/8	
Positions Polarized	-11/272	-45/30 -1/36461 -7/192	11/95 49/8 45/31 40/37 13/108 11/102 7/162 5/49	11/547 11/272 35/21 48/5 23/673 49/8 11/272	48/5		11/283 48/5	11/547 35/21 48/5 45/89	7/176 23/675 49/8	11/155
Confidential Information		7/162	13/108 11/105 7/163 36/1234							
Early Stage of Dispute	45/95			21/11 50 28/589 63/1 42/40 11/275	42/36 47/27 40/39					
Communication Impasse	-9/33 -11/272 -7/133	7/152	40/37 11/547 11/94	45/84 11/272 49/8		3/53				
Parties Cannot Select Process		28/219 27/152 45/30	28/219 45/30							
Known Agreement Areas	45/44 7/108		45/78 7/108							
Need Procedural and Substantive Assistance						45/85 11/256 3/53		45/89 42/33 40/38		
Lack Negotiating Expertise	-45/95 -11/54	45/95	45/95 1/24	45/95	45/95	45/95	45/95	45/95	45/95	

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